(19,360.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 262.

THE TAMPA WATER WORKS COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF TAMPA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

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1 Be it remembered that on the second day of January, A. D. 1904, at a regular term of the supreme court of the State of Florida, came the appellant, The Tampa Water Works Company, by counsel, and filed in the clerk's office of the supreme court of Florida a transcript of the record of the proceedings and decree of the circuit court of Florida for Hillsborough county, in a certain cause wherein The Tampa Water Works Company was plaintiff, and The City of Tampa was defendant, and of the appeal therein from the decree of the circuit court therein rendered, which said transcript of the record of the cause aforesaid and subsequent proceedings to decree is in the words and figures as follows, to-wit:

In the Supreme Court of Florida, January Term, A. D. 1904.

TAMPA WATER WORKS CO., Appellant,
vs.
CITY OF TAMPA, Appellee.

Transcript of record of proceedings in the circuit court of Hillsborough county, Florida, in the suit of The Tampa Water Works Company, complainant, *vs.* The City of Tampa, defendant, therein pending.

On the 26th day of December, A. D. 1901, the complainant filed its bill of complaint, in words and figures following:

To the Honorable Joseph B. Wall, judge of the circuit court of the sixth judicial circuit of the State of Florida in and for Hillsborough county, in chancery sitting:

2 The Tampa Water Works Company, a corporation duly incorporated under the laws of the State of Florida, brings this its bill against the City of Tampa, a municipal corporation of the State of Florida, and thereupon your orator complains and says:

That on or about the 29th day of September, A. D. 1887, the City of Tampa, being thereto duly authorized by its charter and desiring to obtain a supply of water for public purposes, and also to have the inhabitants of said city furnished with water, made and entered into a contract with W. A. Jeter and A. E. Boardman, and in and by said contract agreed with the said Jeter and Boardman that they and their assigns should become incorporated under the laws of Florida as a corporation for the purpose of supplying the city of Tampa and its inhabitants with a good supply of water both for public and private purposes; that it was further agreed in and by said contract that as soon as the corporation was formed the written contract of that date entered into between the City of

Tampa and the said Jeter and Boardman should be assigned to the said corporation; that afterwards the said Jeter and Boardman, with their associates, formed a corporation known as The Tampa Water Works Company, the complainant herein, and duly assigned and transferred all the rights, privileges and franchises conferred upon them by the City of Tampa to the said corporation; that from time to time thereafter the said City of Tampa ratified and confirmed the said contract so made in September, 1887. A copy of the contract of September 29th, 1887, is hereto attached, marked Exhibit "A," and prayed to be taken as a part of this bill. That afterwards, to-wit: on the 6th day of June, A. D. 1889, the said City of Tampa confirmed the contract above mentioned to the said Tampa Water Works Company, and again on the 4th day of October, 1899, the said City of Tampa confirmed the said contract with certain changes therein to your orator; and at various and sundry other times and places during the whole period of time since the first contract herein set out the City of Tampa has confirmed the said contract and ratified and recognized the same as binding upon both your orator and the said City of Tampa. All the ordinances and resolutions of the city of Tampa hereto attached are made part of this bill, marked
3 Exhibits 1, 2 and 3.

Your orator further represents unto the court that it was incorporated under the general incorporation laws of the State of Florida as they existed in the year 1887, and acquired all the rights, powers and privileges conferred upon corporations of a like nature at that time; that the object of its incorporation was solely for the purpose of engaging in the business of furnishing a public and private supply of water to the city of Tampa and its inhabitants.

Your orator further represents unto the court that the contract so entered into between your orator and the City of Tampa is a binding, legal and valid contract, and is protected from impairment both by the constitution of the State of Florida and also particularly by the Constitution of the United States and the amendments thereto.

Your orator further represents that it performed all the covenants and agreements to be undertaken and carried out on its part, as set out in the contract with the City of Tampa, and is at this time performing and carrying out in good faith the covenants on its part contained in said contract; that the service of your orator has been for all this time accepted by the City of Tampa, and that the plant erected by your orator under the contract with the city was within the time limited in said contract duly accepted and approved by the City of Tampa.

Your orator further represents unto your honor that in and by the original contract between your orator and the City of Tampa certain rates for furnishing water to the said city and to the inhabitants thereof were agreed upon and incorporated into said contract, and were the sole consideration moving your orator to the undertaking and carrying out of said contract; that the prices to be paid for

water by the City of Tampa and the inhabitants thereof were
4 fixed for the entire period of thirty years, during which the said contract was to be in existence, and that your orator has up to the time of the amended contract of October 4th, 1899, charged and collected from the City of Tampa and from the inhabitants thereof the amounts specified to be charged in the said contract between the city and your orator.

Your orator further represents that at the time the said water works plant was installed in the city of Tampa, it was a very small village, and that the inducement to invest the money of your orator in said plant was that the said rates so fixed in said contract should be charged during the entire time thereof, your orator hoping and expecting that the city of Tampa would so grow that it would be able to make a reasonable interest on its investment.

Your orator further represents unto your honor that by October 4th, 1899, the city of Tampa had largely grown and increased in size; that your orator, at the request of the said city, investigated the conditions existing at that time, and by a mutual agreement of that date (a copy of said agreement being hereto attached and marked Exhibit "3") decided that it could reasonably make a certain reduction in the rates which it was authorized under its original contract to charge both the City of Tampa and the inhabitants thereof, and by mutual agreement that day entered into the rates were changed as follows:

First. To reduce the rate of spigot for domestic use from $12 per annum to $8 per annum.

Second. To reduce the rate on water closets from $8 to $4 per annum.

Third. The rate for coffee houses and restaurants to be from $18 to $30 per annum, according to the amount of business done.

Fourth. To continue the rate of bath tub, kitchen sink and
5 basin so as to allow hot water spigot to be used in addition to cold without extra charge.

Fifth. To reduce the rate for 100 cubic feet from twenty-five cents to nineteen cents, and a monthly minimum charge where meters are used from the present rate of $2 to $1.50. Water to be furnished to the city through meters for its offices and departments, and for fountains that may be erected, to be at the rate of nine cents per 100 cubic feet.

Sixth. The rate for water to be used for building purposes to be ten cents per thousand brick for the first fifty thousand and five cents per thousand thereafter; the rate for water to be used in plastering to be thirty cents per 100 square yards.

Seventh. In lieu of flushing sewers twice a week free of charge the water company should supply the city with water for flushing sewers through meters and flush tanks at the rate of nine cents per 100 cubic feet.

Eighth Fire hydrant rental to be reduced from $40 to $35 per hydrant per annum from and after the 1st day of January, 1900.

That since the contract last above mentioned the company has been furnishing water to the city and its inhabitants at the rates therein specified, which rates have been paid by the City of Tampa and the inhabitants thereof.

Your orator further represents that on the 20th day of December, 1901, the said City of Tampa, disregarding its obligations to your orator, and in contravention of the laws and constitution of the State of Florida, and particularly in violation of that section of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of a contract, and particularly in violation of the fourteenth amendment to the Constitution of the United States, introduced and passed through the city council and had signed by its mayor the following ordinance, to-wit:

6 Ordinance No. 274.

An Ordinance to Fix the Rates and Charges for the Supply of Water Furnished by Any Individual, Company, or Corporation to the City of Tampa and the Inhabitants Thereof.

Be it ordained by the city council of the city of Tampa:

SECTION 1. That from and after the 1st day of January, A. D. 1902, it shall be unlawful for any individual, company or corporation furnishing water to the city of Tampa or its inhabitants to charge or collect any higher rates for water than those hereinafter specified.

SEC. 2. That the maximum rates to be charged by any individual, company or corporation furnishing water to the city of Tampa and the inhabitants thereof shall be as follows:

First, water furnished to the city of Tampa:

Fire hydrants, per annum	$22.50
Water for flushing sewers through meters and flush tanks, per 100 cubic feet	.07

The city to supply the meters and connections for each flush tank and keep the same in repair at its expense.

Second, water furnished to private consumers:

Single spigot on premises, for domestic use only	$4.00	per annum.
Bath tubs	4.00	"
Water closets	2.00	"
Urinal	2.00	"
Wash basin	1.50	"
Each additional spigot	1.50	"
Yard sprinkler, with fifty feet of hose and one-fourth inch nozzle, in use not more than two hours per day	6.00	"

Academies and schools, twice the private rates.

	Barrooms	12.00	"
7	Restaurants and coffee houses	9.00 to 15.00	per annum.
	Barrooms and restaurants	18.00	"
	Coffeehouses	12.00	"
	Bakeries and barber shops, each	12.00	"
	For buildings, for first fifty thousand brick per thousand	.05	
	And for each succeeding thousand	.2½	
	For plastering, by the hundred yards	.25	"
	Druggist, with soda fountain	12.00	"
	Fountains	6.25 to 25.00	"
	Livery stables	12.50 to 25.00	"
	Offices, for single rooms	3.00	"
	Photograph galleries	12.00	"

Stores the same as dwellings per fixture.

Steam engines, per horse power	2.50	"
Wholesale liquor dealers	12.50 to 25.00	"
Where water is furnished through meters the charge shall be per hundred cubic feet	.10	

The bills of private consumers may be collected quarterly in advance.

The rate on bath tubs, kitchen sinks and basin to allow hot-water spigot to be used in addition to the cold without extra charge.

The individual, company or corporation furnishing water to tap its mains free of charge.

SEC. 3. That any individual, company or corporation, or the officers or agents thereof, furnishing water to the city of Tampa, or the inhabitants thereof, who shall violate any of the provisions of this ordinance, or who shall refuse to furnish water to the city of Tampa, or any of the inhabitants thereof, in compliance with the terms of this ordinance, shall, upon conviction thereof, be punished by a fine of not more than two hundred dollars, or imprisonment for
8 not more than sixty days, or by both such fine and imprisonment.

SEC. 4. That all ordinances or parts of ordinances in conflict with the provisions of this ordinance be and the same are hereby repealed.

Passed by the city council of the city of Tampa this the 20th day of December, A. D. 1901.

(Signed) A. C. MOORE,
President of the City Council.

Attest: (Signed) JNO. M. HENDERSON, City Clerk.

Approved by me this 20th day of December, A. D. 1901.

(Signed) F. L. WING, Mayor.

That said ordinance so set out has been published as required by the charter of the city of Tampa, and, if legal and valid, would go into effect on or about the 28th day of December, 1901.

Your orator represents that the said City of Tampa did not have the power to pass said last mentioned ordinance; that the same violates the contract rights of your orator, and constitutes the taking of its property without due process of law, and impairs the contract heretofore entered into between the said City of Tampa and your orator.

Your orator further represents unto the court that its only remedy is in a court of equity; that the law furnishes no adequate remedy or relief to your orator, in this, to-wit: 1st, that by said ordinance the charging of the contract rates for water is made a penal offense against your orator, and numberless quasi criminal prosecutions would grow out of your orator's attempting to enforce its legal rights; and also in this, to-wit: that the inhabitants of the city of Tampa, acting under the supposed right of the city so to invalidate water charges, would decline to pay the contract rates fixed by the contract between your orator and the city, and your orator would be required to institute numberless suits in order to collect the
9 amounts of money due it. And your orator would suffer irreparable damage unless this court shall intervene, as it has the right to do, and as equity demands, to protect the rights of your orator.

Your orator therefore prays that the said City of Tampa, its agents and officers, may be enjoined during the pendency of this suit from enforcing the said ordinance last above mentioned, reducing the rates for furnishing water both to the city of Tampa and to the inhabitants thereof.

Your orator further prays that upon a final hearing said ordinance last above mentioned may be declared null and void, and that a perpetual injunction may issue against the said City of Tampa, its officers and agents, enjoining and restraining them from enforcing or attempting to enforce said ordinance. And that your orator may have such other and further relief as to equity may seem meet.

May it please your honor to grant unto your orator the State's writ of injunction, issuing out of and under the seal of this court, restraining and enjoining the defendant, its officers and agents, as herein prayed; and also the State's writ of subpœna, to be directed to the said defendant, The City of Tampa, commanding it, on a day and under a penalty therein to be expressed, personally to be and appear before this honorable court, then and there to answer the foregoing bill and to abide by such orders and decrees as may be made herein.

And your orator will ever pray, etc.

SPARKMAN & CARTER,
Attorneys for Complainant.

STATE OF FLORIDA,
County of Hillsborough.

Before the undersigned authority personally appeared G. M. Eldridge, who, being duly sworn, deposes and says that he is the superintendent of the Tampa Water Works Company; that he has read the foregoing bill, and the allegations therein contained are true.

Being further sworn, the said affiant says that the said complainant has not time to give notice of its intention to apply for a restraining order in this cause prior to the going into effect of the said alleged void ordinance, and that the injuries anticipated would to some extent be done before an order of this court could be obtained if notice of the application is given.

G. M. ELDRIDGE.

Sworn to and subscribed before me this 26th day of December A. D. 1901.

[SEAL.] EDWARD L. SPARKMAN,
Notary Public, State at Large.

EXHIBIT A.

Ordinance No. 7.

An ordinance to construct, maintain, and operate water works in the city of Tampa, Hillsborough county, Florida, for a public and private supply of water for domestic, manufacturing, sanitary, and fire purposes.

Be it ordained by the city council of Tampa:

SECTION 1. That in view of the urgent necessity for the better protection against fire, and also to obtain for the use of the inhabitants of said city an abundant supply of good water for all purposes, and upon terms hereinafter mentioned, the exclusive right and privileges to construct, maintain and operate waterworks for public and private supply of water within said city for a term of thirty years is hereby granted to Messrs. W. A. Jeter and A. E. Boardman, and their associates, successors and assigns, together with the right to lay pipes, erect hydrants, fountains and such other structures and appurtenances in any and all of the streets or other public ways in the said city, as may be required for the distribution of water, and to make all necessary repairs, provided that there shall be no unnecessary or permanent obstruction of any of the said streets or ways.

SEC. 2. The conditions upon which these privileges and franchises are granted are made the subject of a contract made and entered into between the City of Tampa, by the mayor and council of said city of Tampa, and the said Jeter and Boardman, which reads as follows, and is hereby made a part of this ordinance:

STATE OF FLORIDA, }
County of Hillsborough. }

This indenture, made in duplicate, and entered into this the 20th day of September, A. D. 1887, between the City of Tampa by the mayor and city council of said city, parties of the first part, and Messrs. W. A. Jeter and A. E. Boardman, and their associates, constituting the Tampa Water Works Company, party of the second part.

Witnesseth, that, for and in consideration of the sum of four thousand and nine hundred and fifty dollars per annum, lawful money of the United States of America, to be paid as hereinafter set forth by the parties of the first part to the parties of the second part, said parties of the second part agree to do and perform the following covenants, stipulations and undertakings, that is to say:

Erect water works, with a reservoir capable of holding one hundred thousand gallons of water, and sufficiently high to give a pressure on the mains such that, from a hydrant located at the intersection of Washington and Franklin streets, and through one hundred feet of fire hose and a one-inch nozzle, a stream of water projected vertically a distance of fifty feet. To supply with water for fire purposes, giving a first-class fire protection and the necessary demands of the fire department in their practicing and parades, one hundred and ten double nozzle hydrants of the usual pattern, with nozzles to fit the depart-
12 ment's hose, and placed upon the mains as follows: Sixteen thousand and thirty feet of eight-inch mains, sixteen thousand and forty feet of six-inch mains, eleven thousand, eight hundred and ninety feet of four-inch mains; all of said mains to be located on the principal streets, and none of said hydrants to be further apart than an average of four hundred feet, and also to supply with water, for the payment of city taxes and license for the first ten years of this contract, the city hall, guard house and market house, with one spigot each of a half-inch opening, also two drinking fountains, with one-quarter inch openings, at such places on the mains as designated by the city council; all the fountains that the city may desire to have erected, the city to pay at the rate of not more than twenty-five cents per one hundred cubic feet used, and these fountains to be for the use of the public for domestic purposes only, and not for manufacturing or sale.

And it is further agreed that a sufficient tax shall be levied and collected annually upon all taxable property of the city subject by law to such tax, to meet the payments under this ordinance as they may respectively mature during the existence of any contract for public fire service, which tax shall — irrepealable from and after the passage of this ordinance, and in case the city shall be authorized to levy a special tax for such purpose, such tax shall be annually levied and collected, and the proceeds thereof shall be kept as a separate fund and shall be irrevocably and exclusively devoted to the

payment of the hydrant rentals under this ordinance, and shall not be otherwise employed, except that in excess of said tax in any one year more than the amount necessary to pay the rentals for such year may be used for any purpose or purposes that the city council shall direct.

And it is further agreed that the city shall pass such ordinances as will protect the property of the party of the second part and enforce such penalties and fines upon any one injuring said
13 property as shall, when divided between the parties to this contract, reimburse the parties of the second part for repairs made necessary by such injury, provided that the damages do not exceed the fine limited by charter. In consideration whereof, and for the work to be done and services to be rendered, the parties of the first part hereby agree to pay to the parties of the second part the sum of four thousand, nine hundred and fifty dollars per annum, in equal semi-annual payments, on the first days of January and July of each year. If the said parties of the first part have not sufficient funds, or for any cause do not pay said money at the times fixed as aforesaid, then and in that case vouchers shall be issued to the parties of the second part for said sums, which vouchers shall draw interest at the rate of seven per cent. per annum until paid. And further, the parties of the first part hereby give to the parties of the second part the exclusive rights to streets and forbid the laying of pipes through the streets by others for the sale of water during the continuance of this contract; and the parties of the second part are accorded the privilege of laying a water pipe through the streets and alleys and crossing all streams in said city, provided always that the public tracks and streams shall not be unnecessarily obstructed and the roadways left in as good condition as before laying the said pipe.

The parties of the first and second part agree that this contract shall continue in force for the space of thirty years from the time the water works are completed and ready for duty; and it is agreed that at any time after the expiration of ten years from the time the said water works are completed the city shall have the right to purchase said water works, together with all the appurtenances thereunto belonging, at the value thereof, such price and value to be agreed upon by the parties to this contract, or their successors, by giving to the parties of the second part notice one year in advance of its intention to do so. And in case said parties can not agree as to the price to be paid for said water works and appurte-
14 nances thereunto belonging, then such price shall be determined by arbitration of three arbitrators, one to be selected by the parties of the first part, or their successors in office, and another by the parties of the second part and these two shall select a third, such parties to be entirely disinterested and to be selected by each party without delay after such failure to agree on the price of said works.

The action and decision of the arbitrators, unless fraud or undue influence be shown, shall be binding on the parties hereto. Should the city not wish to purchase at the expiration of thirty years, then this contract is to be renewed for not less than five years, and then this franchise shall cease and be reopened for competition, and at the option of the city.

And it is further agreed that the parties of the first part reserve the right, after due notice to the parties of the second part, to declare this contract forfeited and at an end in case the parties of the second part do not begin the construction of the water works by or before the first day of January, A. D. 1888.

It is further agreed that the parties of the second part shall assume all liabilities to persons and property arising from constructing or operating said works. And it is agreed that the stock and bond list of the company shall be open for the first thirty days to the citizens of Tampa to subscribe to the same during that time, and it is agreed that the owners of the said water works may charge and collect quarterly, in advance, for water furnished private consumers, prices not to exceed the following maximum rates and rules:

Dwellings, single spigot on the premises, for domestic use only	$12.00
Bath tubs in addition	8.00
Water closets	8.00
15 Wash basins	4.00
Urinals	4.00
Spigot	3.00

Dwellings using several fixtures rated less than the sum of separate rates.

Yard sprinklers, with fifty feet of hose and a 1¼ inch nozzle, in use not more than two hours per day	12.00
By the month	2.00

Sprinklers must not be used at night or during a fire.
Academies and schools double private rates.
Boarding houses double private rates.

Bar rooms	24.00
Bar rooms and restaurants	36.00
Bakeries and barber shops	24.00
Building, laying brick per thousand	.10
Plastering per hundred yards	.50
Druggists with soda fountains	24.00
Fountains	12.00 to 50.00
Livery stables	25.00 to 50.00

Offices, single rooms	6.00
Photograph galleries	24.00
Stores, same as dwellings per fixture.	
Steam engine, per horse power	5.00
Wholesale liquor dealers	25.00 to 50.00
Hotels, mills, manufactories and other large consumers by meter or special rates, per 100 cubic feet	.25

No continual flow through any opening will be allowed, and letting it run to prevent freezing is strictly prohibited. Payments for water rents must be made quarterly in advance. Any bill remaining unpaid for fifteen days will render the consumers liable to have the water cut off, and in such event fifty cents will be charged for the work of turning it on again. Bills by meter must be paid monthly. Consumers are not allowed to supply any premises
16 but their own with water, under the penalty of the company refusing to sell to them. The company reserves the right to enter premises supplied with water during the business hours of the day for the purpose of examining fixtures, establishing rates and preventing waste. In no case where meters are used shall annual charges be less than $25.00, whether registers water of that value or not. For all uses not herein specified the price shall be within the discretion of the water works company. Water closets and urinals shall be automatic as regards flushing attachments, and subject to the inspection of the owners of the water works or their superintendent in charge. It is further agreed that, as the city grows, and for such, or for any other reason, should desire more hydrants, that the parties of the second part shall erect them, and the city shall pay for them, in addition to the four thousand, nine hundred and fifty dollars already stated, the sum of forty-five dollars per annum for each additional hydrant under the conditions heretofore stated, provided the parties of the first part shall not require any hydrant on a street at a greater distance than four hundred feet from the mains already laid. And it is further agreed that when the number of hydrants rented by the city shall reach two hundred in number, the price for all shall be reduced to forty dollars per hydrant per annum, and the same for those erected thereafter.

It is further agreed that the parties of the second part shall flush the sewerage of the city twice per week at the option of the city, and it is further agreed that the parties of the second part shall maintain a standard pressure of forty pounds to the square inch on the mains from the standpipe, to be indicated by a guage to be placed anywhere in the city, at the option of the city.

In witness whereof the parties of the first part and second part, by the mayor and councils and presidents, respectively, set their hands

and affix their seal the day and year first above written, and hereto attach the seal of the city of Tampa, Florida.

17 (Signed) W. A. JETER,
President of the Water Works Company.
GEORGE B. SPARKMAN,
Mayor of the City of Tampa, Fla.
C. E. HARRISON,
President of the City Council of the City of Tampa, Fla.
I. S. GIDDENS,
C. A. MARTINEZ YBOR,
FRED M. MEYER,
C. N. BRIGHAM,
W. B. HENDERSON,
H. L. KNIGHT,
S. L. BIGLOW,
W. A. HONAKER,
Councilmen of the City of Tampa, Fla.

Attest:
[SEAL.] (Signed) LAMONT BAILEY,
City Clerk.

SEC. 3. The main or pipe system shall be laid in such streets as shall give the greatest amount of fire protection and the distribution of an adequate amount of water to the consumers.

There shall be a proper number of stop valves and gates placed along the system of distribution to properly subdivide the same into districts, so that in repairs and extensions the districts deprived of water shall be reasonably small.

SEC. 4. Upon the acceptance of this ordinance by the said Jeter and Boardman, their associates, successors or assigns, the city council, or its authorized agent, shall locate upon a map of the mains, to be furnished by the said Jeter and Boardman, their associates or assigns, at least one hundred and ten double-nozzle fire hydrants of standard pattern and make, which hydrants shall be furnished at such designated points by the contractors of the water works, the said Jeter and Boardman.

SEC. 5. That the said Jeter and Boardman, their associates, successors or assigns, shall, in accordance with this contract (section 2 of this ordinance), extend the water mains to any part of the
18 said city, when ordered to do so by the proper authorities of the city of Tampa, and on all extensions or pipes so ordered shall be placed at least one additional hydrant for four hundred feet of the extended pipe at the annual rental provided in section 2 of this ordinance.

SEC. 6. It is provided and ordained that the owners of said water works may charge and collect quarterly for water furnished private consumers, prices not exceeding the price named in section 2 of this ordinance.

SEC. 7. As provided in section 2 of this ordinance, the City of Tampa shall levy and collect no municipal tax against the water works upon its stock or earnings or upon material entering into their construction or operation during a period of ten years from the passage of this ordinance.

SEC. 8. That the said Jeter and Boardman, their associates, successors or assigns, shall, by or before the first day of January, A. D. 1888, commence work upon said water works, after having filed a written acceptance hereof with the clerk of the city, and such work shall be prosecuted with reasonable diligence, so that such works shall be completed and in operation by or before the first day of January, A. D. 1889; otherwise, all rights acquired by said Jeter and Boardman, their associates, successors or assigns by virtue of this ordinance shall be forfeited, and the contract hereunder null and void, as provided by section 2 of this ordinance.

SEC. 9. That said Jeter and Boardman, their associates, successors or assigns, shall at all times protect all trenches and excavations incident to the construction, erection or repairs of the proposed water works, and shall assume all liabilities and pay all damages (holding the city harmless from the same) which may be sustained by persons or property by reason of their neglect or delay in so using or returning the said streets or public ways to their previous condition, as is provided for in section 2 of this ordinance.

19 SEC. 10. If default be made in any of the conditions specified in this ordinance by the said Jeter and Boardman, their associates, successors or assigns, then the ordinance shall become null and void, otherwise it shall remain and be in full force from the date of its passage.

SEC. 11. Be it further ordained that, for the purpose of fully maintaining the water works provided for herein, there shall annually — levied and collected on all real estate and personal property within the corporate limits of the city of Tampa a tax of five mills, which shall be applied to the payment of the obligations incurred herein and for no other purpose.

SEC. 12. Be it further ordained that any person who shall wilfully and maliciously in any manner damage any of the water pipes, engines, reservoir, or other works and property of the said water company, on conviction thereof, shall be fined in a sum not less than twenty-five nor more than one hundred dollars, at the discretion of the mayor. That the City of Tampa hereby approves, ratifies and confirms the foregoing contract made and entered into with the said Jeter and Boardman, and their associates, by the mayor and president of and the city council of the said city of Tampa, Florida, and for the purpose of carrying out the provisions of the same, does hereby guarantee the payment of the interest to accrue upon the bonds which may be issued by the said Jeter and Boardman, constituting the Tampa Water Works Company, at the rate of six per cent. per annum, which sum, not to amount in the aggregate more than four thousand, nine hundred and fifty dollars, to an amount of said bonds

not to exceed the sum of eighty-two thousand and five hundred dollars, said interest payable semi-annually for a period of thirty years, which said interest coupons shall be made payable at the treasurer's office of the said city of Tampa, and shall be receivable for taxes and all other debts and obligations due said city, and said coupons, when paid by the treasurer of Tampa as aforesaid, shall be a receipt and acquittance to said city in discharge of said sum of four thousand, nine hundred and fifty dollars, agreed as aforesaid, to be paid annually to said Tampa Water Works Company for the rental of said one hundred and ten hydrants to the extent and amount of said coupons so paid.

SEC. 13. All ordinances and parts of ordinances of this city in conflict with the provisions of this ordinance be and the same are hereby repealed.

Approved September 29th, 1887.

EXHIBIT 1.

Ordinance No. 42.

An ordinance to amend an ordinance entitled "An ordinance to construct and maintain and operate water works in the city of Tampa, Hillsborough county, Florida, for a public and private supply of water for domestic, manufacturing, sanitary, and fire purposes."

Be it enacted by the city council of Tampa:

SECTION 1. That, in view of the rapid growth of the city more hydrants are needed for fire protection, and as, under section 5 of ordinance 7, the Tampa Water Works Co. will extend their mains and erect hydrants when ordered to do so by the proper authorities of the city of Tampa; now, therefore, it is hereby ordered that said water mains be extended, and that twenty-seven additional hydrants, of similar patter- to those already in use in the city, be erected under the provisions of ordinance No. 7, and that the city pay therefor the additional sum of twelve hundred and fifteen dollars ($1,215.00) per annum to said water works company, as provided in section 2 of ordinance No. 7.

SEC. 2. Be it further ordained, That section 12 of ordinance No. 7 be and is hereby amended to read after the first sentence as follows: That the City of Tampa hereby approves, ratifies and confirms the foregoing contract made and entered into with said Jeter and Boardman and their associates, constituting the Tampa Water Works Company, by the mayor and president of the city council of said city of Tampa, Fla. with these amendments, and for the purpose of carrying out the provisions of the same does hereby guarantee the payment of the interest to accrue upon the bonds which may be issued by said Tampa Water Works Company on the

first day of January, 1890, at the rate of six per cent. per annum, such sum not to amount in the aggregate to more than six thousand, one hundred and sixty-five dollars per annum, and the said bonds not to exceed the sum of one hundred and two thousand dollars, said interest payable semi-annually for the period of the unexpired term of franchise granted Jeter and Boardman September 20th, 1887, which said interest coupons shall be made payable, less the exchange, at the office of the Farmers' Loan and Trust Company, in the city of New York, or at the office of the city treasurer of the city of Tampa, and shall be receivable for taxes and all other debts and obligations due said city; and said coupons, when paid by the treasurer of Tampa or said trust company, shall be a receipt and acquittance to said city in discharge of said sum of six thousand, one hundred and sixty-five dollars, as aforesaid, to be paid annually to said Tampa Water Works Co. for the rental of said one hundred and thirty-seven hydrants, to the extent and amount of said coupons paid.

SEC. 3. All ordinances and parts of ordinances of this city in conflict with the provisions of this ordinance be and the same are hereby repealed.

Approved June 6th, 1889.

EXHIBIT II.

Ordinance No. 51.

22 Whereas, by an ordinance approved on the twenty-ninth day of September, in the year eighteen hundred and eighty-seven, entitled ordinance No. 7, the mayor and city council of Tampa granted to the Tampa Water Works Company, upon the terms therein set forth, the right to construct, operate and maintain a system of water works for the purpose of supplying water to the said city and its inhabitants; and whereas, on or about the sixth day of June, in the year eighteen hundred and eighty-nine, an amendatory ordinance, entitled ordinance No. 42, was passed by the said mayor and city council, providing, among other things for the payment, at the Farmers' Loan and Trust Company in the city of New York, of interest on certain bonds which the said water company proposed to issue on the first day of January, in the year eighteen hundred and ninety; and whereas, because of questions that have been raised as to the true intent and meaning of the terms in said ordinance No. 7, whereby the city reserves the right to purchase the property therein mentioned, the said water company has encountered difficulty and been delayed in raising the money needed to complete the said works and get the same into running order, so that it has become necessary to change the time of the issue of the bonds proposed as aforesaid. And whereas, it is to the interest of the City of Tampa that the said works should be

completed at as early a date as possible, and it is also desirable that the right reserved to said city should be free from any doubt:

Be it resolved and ordained and enacted by the city council of Tampa:

SECTION 1. That the true intent and meaning of said ordinance No. 7 is to reserve to the City of Tampa the right to purchase at any of the periods therein designated all of the property of every kind belonging to the Tampa Water Works Company, including the franchises and privileges granted by the said ordinance
23 and now enjoyed by the said company. And in case the said city and the said company fail to agree upon the price thereof, that the value of the said property, including the franchises and privileges aforesaid, shall be determined by arbitrators, in the manner provided by said ordinance.

SEC. 2. That the provisions in the second section of ordinance No. 42, looking to the issue by the said water company — ($102,000.00) on the first day of January, in the year eighteen hundred and ninety, and to the payment of the interest on the same at the Farmers' Loan and Trust Company, in New York, be amended so that the said ($102,000.00) bonds may be dated on the first day of March, in the year eighteen hundred and ninety, and the interest made payable at the Safe Deposit & Trust Company of Baltimore, or at such other place as may be designated by the water company.

Provided, however, that the amount of said bonds, and the interest to be paid, shall not be altered, and the first payment of rental to be on the first day of July, A. D. 1890.

SEC. 3. That, if the said City of Tampa shall elect to exercise the right of purchase, reserved as aforesaid, and at the time of such purchase the said property be subject to mortgage or deed of trust given to secure bonds of the said water company, which shall not have then matured, the City of Tampa shall have the right to have the amount of such bonds then outstanding deducted from the cash price to be paid for said property, and the amount so to be deducted shall be payable by the said city at maturity of said bonds.

Approved February 6th, 1890.

EXHIBIT III.

Whereas, there is in existence and force a valid contract between the City of Tampa and the Tampa Water Works Company, which said contract is hereby recognized by both the City of Tampa and the Tampa Water Works Company as binding upon the
24 parties;

And whereas, there is now pending in the circuit court of Hillsborough county, State of Florida, on the chancery side thereof, certain litigation between the City of Tampa on the one part and the Tampa Water Works Company on the other, over the construction of said contract heretofore entered into between the said City of Tampa and the said Tampa Water Works Company as aforesaid;

And whereas, it is to the mutual interest of both parties that said litigation should be terminated;

And whereas, the parties have come to the following agreement in words and figures following:

This agreement, made and entered into this 4th day of October, A. D. 1899, by and between the City of Tampa of the first part and the Tampa Water Works Company, party of the second part, witnesseth:

That the said Tampa Water Works Company, for an- in consideration of the covenants hereinafter mentioned to be performed by the party of the first part agrees from and after January 1st, 1900, to reduce the water rates specified in the contract existing between the said parties in the following respects, to wit:

First. To reduce the rate on spigots for domestic use from twelve dollars per annum to eight dollars per annum.

Second. To reduce the rate on water closets from eight dollars to four dollars per annum.

Third. The rate for coffeehouses and restaurants to be from eighteen to thirty dollars per annum, according to the amount of business done by the said coffeehouses or restaurants.

Fourth. To construe the rate on bath tub, kitchen sink and basin so as to allow hot-water spigot to be used in addition to the cold without extra charge.

Fifth. To reduce water rates for 100 cubic feet from twenty-five cents to nineteen cents; a monthly minimum charge where meters are used from the present rate of two dollars to one dollar and fifty cents, customers to have the privilege of taking water by meter of they so desire, in which case they shall pay for the meter and connections, the water company to have the privilege of setting meter and collecting the meter rates at its option, in which case the water company shall pay for the meter and connections. Water to be furnished to the city through meters for its offices and departments and for fountains that may be erected to be at the rate of nine cents per hundred cubic feet.

Sixth. The rate for water used for building purposes shall be ten cents per thousand brick for the first fifty thousand brick and five cents per thousand thereafter. The rate for water used in plastering shall be thirty cents per hundred square yards.

Seventh. In lieu of flushing sewers twice a week free of charge, the water company shall supply the city with water for flushing sewers through meters and flush tanks at the rate of nine cents per hundred cubic feet, the city to supply the meters and connections for each flush tank and keep the same in repair at its expense. The water company to tap its mains for connections free of charge.

Eighth. Fire hydrant rental to be reduced from forty dollars to thirty-five dollars per hydrant per annum from and after the date above mentioned, to-wit: January 1st, 1900, the water company to have the right to place at once thirty additional hydrants on existing pipe lines at an average distance of four hundred feet apart;

the payment of rental for such additional hydrants to begin at the beginning of the quarter next after they are completed and ready for use. Additional pipe lines to be located and
26 laid by the water company for the purpose of increasing the capacity of the pipe system and providing for the future growth of the city, and the company to place upon these additional pipes thirty additional fire hydrants at an average distance of four hundred feet between hydrants; said additional pipes and hydrants to be laid and erected not later than June 1st, 1902; payment of rental on fifteen of these hydrants to begin at the first quarter after their erection, but not sooner than June 1st, 1900; payment for rental on the remaining hydrants shall begin at the first quarter after their erection, but not sooner than June 1st, 1901. Pipe lines to be laid and twenty additional fire hydrants to be erected thereon at an average distance of four hundred feet apart, at such locations as the city may determine, by or before June 1st, 1903; payment for rental for the same to begin at the first quarter after their erection, but not before June 1st, 1902, unless the company be required by the city to place them before that date.

And the said City of Tampa on its part, for and in consideration of the covenants above mentioned on the part of the Tampa Water Works Company, hereby agrees:

First. To dismiss all suit or suits pending between it and the said company in any of the courts of this State.

Second. To pass and enforce all ordinances that may be necessary to protect the water supply of the said water company from pollution within the limits of the said city.

Third. The said city agrees to furnish promptly the grades upon the streets upon which water mains are to be laid and hydrants erected, and after the laying of such pipes the grades so fixed shall become unalterable, and if faithfully observed by the said water company it shall be held harmless from any future expense from changing said pipes made necessary by a change of grade.

27 Fourth. To pass such reasonable ordinances as may be necessary to protect the said water company from any waste of its waters by consumers thereof or others.

Fifth. As the safety of the property of the citizen is largely dependent upon an efficient management of the water works, and to that end the rules and regulations are necessary to be observed, it is hereby agreed that the party of the second part shall have the right to pass and enforce all such reasonable rules and regulations as may be necessary for the management of said works from time to time as are usual in water works management, and not in conflict with the city ordinances or the laws of the State.

Sixth. It is further agreed on behalf of the city that it will carry out and perform the covenants herein agreed on its part in reference to all matters, and particularly as to the accepting and paying for additional hydrants herein provided for at the rental herein specified.

Seventh. In consideration of the covenants herein mentioned, it is agreed that the City of Tampa shall not during the life of this contract enter into competition with the said party of the second part in the supplying and furnishing of water to said city or its inhabitants.

Eighth. It is further agreed on behalf of the said City of Tampa that in the event of its failure to pay hydrant rentals and water charges for the space of twelve months after the same have become due, then in that event all the rates and charges set out in the original contract between the City of Tampa and the said Tampa Water Works Company shall at once become operative and be in force, and none of the reductions herein specified and agreed to shall thereafter be of any further force and effect.

Therefore, be it resolved by the city council of the city of Tampa,

That the foregoing agreement shall become operative imme-
28 diately according to the terms herein expressed, and the mayor, president of the city council and the city auditor be and they are hereby authorized and directed to execute this contract on behalf and in the name of the City of Tampa, and to attach to said contract the corporate seal of said city.

Passed by the city council this the 4th day of October, 1899.

FRANK BRUEN,
President of the City Council.

Attest: JOHN M. HENDERSON, City Clerk.

Approved October 4th, 1899.

F. C. BOWYER, Mayor.

Endorsed: Filed December 26th, 1901. J. B. Wall, judge.

On the 26th day of December, A. D. 1901, the court rendered a decree granting a restraining order and temporary injunction in the words and figures following:

In the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Hillsborough County. In Chancery.

TAMPA WATER WORKS COMPANY
vs.
THE CITY OF TAMPA. } Bill for Injunction.

The above entitled cause coming on to be heard upon this 26th day of December, A. D. 1901, and the court having considered the allegations of said bill, it is thereupon ordered, adjudged and decreed that a temporary restraining order as prayed for in said bill do issue at once restraining the defendant, The City of Tampa, its officers and agents, from enforcing the ordinance No. 274 as set out in said bill reducing the water rates to be charged for furnishing water to the city of Tampa and the inhabitants thereof.

29 It is further ordered that within ten days from date the complainant, The Tampa Water Works Company, give a bond to the City of Tampa, conditioned as required by law, with two good and sufficient sureties, in the penal sum of two hundred and fifty dollars, and upon the giving of which said bond a temporary injunction as prayed for in the bill shall issue. The restraining order herein issued to be in force until the issuing of said temporary injunction, and that said temporary injunction remain in force until the further order of this court.

Done and ordered this 26th day of December, A. D. 1901.

J. B. WALL, Judge.

On the — day of December, A. D. 1901, the complainant filed its bond in accordance with the decree of the court rendered on the 26th day of December, A. D. 1901, and thereupon a writ of injunction duly issued.

On the 29th day of December, A. D. 1902, the complainant filed an amendment to the bill of complaint in the words and figures following:

In the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Hillsborough County. In Chancery.

TAMPA WATER WORKS COMPANY
vs.
THE CITY OF TAMPA.

Now comes the complainant in the above styled cause and asks leave of the court to amend the bill of complaint as follows, to-wit:

First. By inserting after the word "orator" of the ninth line of the seventh page of said bill the following words, to wit: "That under and by virtue of the general incorporation law of the State of Florida in force at the time of the incorporation of your
30 orator it was provided, among other things, as follows: 'Any corporation authorized and put into successful operation under this law shall have exclusive privileges for the purpose of its creation for the term of twenty years from the date the corporation commences to carry out in good faith the terms of its articles of incorporation. Provided, however, that this investment shall not so operate as to divest any future legislatures of those powers of government which are inherent and essential attributes of sovereignty, to-wit: the power to create revenue for public purposes, to provide for the common defense, to provide safe and convenient ways for the public necessity and convenience, and to take private property for the public use, and the like.' And that in the year 1888, and prior to any change in the aforementioned law, your orator did put into

successful operation its water works and has continued the same up to the filing of this bill.

That on the 24th day of January, 1899, the defendant herein, the said City of Tampa, filed its bill on the chancery side of this court against your orator, setting forth therein and making exhibits thereto said ordinance No. 7, containing the original contract with your orator, also said ordinances Nos. 42 and 51, and alleging in substance that your orator, the defendant in said suit, had failed to furnish the city of Tampa sufficient water pressure or water in sufficient quantity to give a first-class fire protection, as it had agreed in said contract to do; that the said City of Tampa had no right to contract with your orator to furnish water to said city for the period of thirty years, or bind the city to guarantee the interest on your orator's bonds, as it had agreed to do in said contract, and as is set forth in said ordinances Nos. 7, 42 and 51; that the said city had no right to fix the rates to be charged consumers by your orator for a period of thirty years, as it had done in said contract, but that said city had the right at any time to change such rates and substitute lower rates therefor; that your orator had not at all times
31 furnished the pressure, or quantity or quality of water as agreed upon, and that the contract between your orator and said city was null and void and should be canceled for said reasons set forth in said bill; that under and by virtue of ordinance No. 199, passed by the city council of the city of Tampa and approved on the 26th day of February, 1898, providing for the repeal of ordinances No. 7 and No. 42, said ordinances Nos. 7, 42 and 51 had been so repealed, which ordinance No. 199 was made a part of said bill and marked Exhibit "D" thereto.

And your orator further shows that said City of Tampa, complainant in said bill, prayed therein that said contract and ordinances Nos. 7, 42 and 51 should be declared null and void and in no way binding upon said city; that said city be released from all its obligations under the said contract and ordinances; that so much of said contract as provides for an exclusive right on the part of your orator, the defendant in said suit, to occupy and maintain its mains in the city of Tampa and binding the said city to take water from your orator for the term of thirty years, at rates therein mentioned, should also be declared null and void, and said city released from the conditions thereof; that so much of said contract as stipulates that the City of Tampa shall guarantee the payment of interest on said bonds issued by your orator be declared null and void and the said city be released from the obligations thereof; that so much of said contract as provides for the taking of water by the citizens of Tampa at the rates stipulated in said contract and the right of the defendant to cut the water off from the premises and the payment therefor of fifty cents to have the same turned on again might also be declared null and void and in no way affecting or binding upon the citizens of the said city of Tampa; and further, that the entire contract as aforesaid might be for the reasons therein set forth,

declared null and void, and the said city released from the provisions thereof, and that the same be set aside and declared null and void, and for such further relief in the premises as might seem meet and proper.

32 And your orator further shows that in due time it answered said bill admitting the contract and the passage of the said ordinances as therein set forth, but denying that it, your orator, had failed to furnish a sufficient quantity of water to give the pressure provided for by said contract or to give a first-class fire protection, but claiming that it, your orator, the defendant in said suit, had furnished water both in quantity and quality as it had agreed to do, and in every particular had complied with its said contract with the said city. Your orator, as such defendant, further denied that said contract was null and void on account of any of the things mentioned in said bill, or that it should be canceled therefor. Your orator further, in its said answer, denied the right or power of the said city to pass or enforce ordinance No. 199, alleging that said ordinance impaired the obligation of said contract, that said ordinance was null and void, was in violation of the Constitution of the United States, especially of article 1, section 10, thereof, and the fourteenth amendment thereto, and also of the constitution and laws of the State of Florida.

Your orator further shows that said answer also contained a demurrer to said bill in the following words: "This defendant further answering says that complainant has not made such a case in and by its said bill as would entitle it to the relief prayed, or to any relief in a court of equity, and defendant claims the same benefit therefrom as if it had demurred to said bill of complaint."

And your orator further says that, shortly after the filing of said answer, the agreement set forth in Exhibit 3 thereto was entered into; and that shortly thereafter, to-wit: on the 9th day of October, 1899, the City of Tampa, acting under and in pursuance of said agreement, through its solicitor, C. C. Whitaker, filed a præcipe for dismissal of said suit, whereupon the clerk of said court entered an order dismissing the same, which order is made a part of this your orator's bill and marked Exhibit 4.

33 And your orator further shows that all the matters set forth in said bill and answer, including the question as to the legality of said contract in all its details, as also the right to contract for a period of thirty years, the right of the city council to change the rates to be charged consumers as fixed in said contract by the city without the consent of your orator, were raised and presented in said proceedings, and were by reason of the order and decree finally dismissing said suit, determined and adjudicated against the contention of the defendant herein; that the said former bill and the said several proceedings and final order and decree in the said former suit still remain determined and in full force; that the same are now *res adjudicata;* that said determination is the law of this case, and the defendant has no right to interfere with said contract

in any way or to reopen the questions so adjudicated, in this or any other suit with your orator."

SPARKMAN & CARTER,
P. O. KNIGHT,
Attorneys for Complainant.

Ex. IV.

THE CITY OF TAMPA
vs.
THE TAMPA WATER WORKS COMPANY.

October 9th, 1899.—Præcipe for dismissal and suit hereby dismissed.

H. L. MITCHELL, Clerk,
By C. M. KNOTT, D. C.

STATE OF FLORIDA,
County of Hillsborough.

Before the undersigned authority personally appeared W. A. Carter, who, being duly sworn, deposes and says that he is of counsel for complainant in the foregoing cause; that the matters and things set out in the foregoing amendments are true.

W. A. CARTER.

34 Sworn to and subscribed before me this 29th day of December, A. D. 1902.

JESSIE WAUCHOPE,
[SEAL.] Notary Public for the State of Florida at Large.

The foregoing application to amend the bill coming on to be heard, counsel for the respective parties being present, the same is granted and the foregoing amendments filed as part of the original bill. Done this 29th day of December, 1902.

J. B. WALL, Judge.

On the 22d day of December, A. D. 1902, the defendant filed a demurrer to the bill of complaint in the words and figures following:

In the Circuit Court, Sixth Judicial Circuit of the State of Florida, in and for Hillsborough County. In Chancery.

TAMPA WATER WORKS COMPANY, Complainant,
vs.
CITY OF TAMPA, Defendant.

Now comes the defendant in the above stated cause, The City of Tampa, and demurs to the bill of complaint therein as amended, and says that the complainant hath not in and by its said bill of

complaint made or stated such a case as doth or ought to entitle it in a court of equity to the relief therein and thereby prayed, or to any relief, and the defendant specifies as grounds of demurrer:

First. That the said bill of complaint is wholly wanting in equity.

Second. That the ordinance of the city of Tampa, No. 274, complained of in said bill of complaint was a valid ordinance under chapter 5070, Acts of 1901.

35 Third. That the alleged contracts under which complainant's alleged rights are sought to be derived were *ultra vires* and void.

Fourth. That the City of Tampa had no authority to agree upon rates for water supply for the period alleged in said bill.

Fifth. That the complainant has a full, complete and adequate remedy at law.

Sixth. That the alleged contracts set forth in the bill of complaint are unconscionable and contrary to public policy.

Seventh. That if the complainant acquired any rights under the alleged contracts set forth in the bill of complaint, they were acquired subject to future legislation, and such legislation could not be construed to impair the obligation of a contract.

Eighth. That the complainant acquired no rights by virtue of its alleged incorporation.

Ninth. That the former proceedings set up in the amendment to the bill did not terminate in a final adjudication on the merits, and do not sustain a claim of *res adjudicata;* and the city could not bind itself to impart validity to the alleged contracts by such a dismissal of its bill.

JOHN P. WALL AND
MACFARLANE & GLEN,
Solicitors for Defendant.

I hereby certify that I am one of the solicitors and of counsel for the defendant in the above stated cause, and that in my opinion the foregoing demurrer is well founded in law.

JAMES F. GLEN.

STATE OF FLORIDA,
Hillsborough County.

36 Before me personally came John P. Wall, who, being by me duly sworn, says that he is city attorney of the City of Tampa and makes this affidavit in its behalf, and that the foregoing demurrer is not interposed for the purpose of delay.

JOHN P. WALL.

Sworn to and subscribed before me this 21st day of November, A. D. 1902.

FLOSSIE ROBERTSON,
Notary Public.

[SEAL.]

On the 29th day of December, A. D. 1902, the defendant filed a motion to dissolve the temporary injunction in the words and figures following:

In the Circuit Court, Sixth Judicial Circuit of the State of Florida, in and for Hillsborough County. In Chancery.

TAMPA WATER WORKS COMPANY, Complainant,
vs.
CITY OF TAMPA, Defendant.

Now comes the defendant in the above stated cause, The City of Tampa, by its solicitors, and hereby moves the court to dissolve the temporary injunction heretofore issued therein, upon the following grounds, viz:

First. That the bill of complaint filed in said cause is wholly wanting in equity.

Second. That the ordinance of the city of Tampa No. 274, complained of in said bill of complaint, was a valid ordinance under chapter 5070, Acts of 1901.

Third. That the alleged contracts under which complainant's alleged rights are sought to be derived were *ultra vires* and void.

37 Fourth. That the City of Tampa had no authority to agree upon rates for water supply for the period alleged in said bill.

Fifth. That the complainant has a full, complete, and adequate remedy at law.

Sixth. That the alleged contracts set forth in the bill of complaint are unconscoinable and contrary to public policy.

Seventh. That if the complainant acquired any rights under the alleged contracts set forth in the bill of complaint, they were acquired subject to future legislation, and such legislation could not be construed to impair the obligation of a contract.

Eighth. That the complainant acquired no rights by virtue of its alleged incorporation.

JOHN P. WALL AND
MACFARLANE & GLEN,
Solicitors for Defendant.

To the complainant in the above stated cause, The Tampa Water Works Company, and Messrs. Sparkman & Carter and Peter O. Knight, its solicitors of record:

You are hereby notified that we shall present the motion accompanying this notice before the Hon. J. B. Wall, judge of the sixth judicial circuit of Florida, at his chambers in Tampa, Florida, on the 27th day of November, A. D. 1902, at 10 o'clock a. m., or as

soon thereafter as counsel can be heard, and there move the said judge to dissolve the temporary injunction issued in said cause.

JOHN P. WALL AND
MACFARLANE & GLEN,
Solicitors for Defendant.

38 Receipt of a copy of the foregoing notice and motion is acknowledged this 21st day of November, A. D. 1902.

SPARKMAN & CARTER,
Solicitors for Complainant.

On the 29th day of December, A. D. 1902, the court rendered its final decree in the words and figures following:

In the Circuit Court, Sixth Judicial Circuit of the State of Florida, in and for Hillsborough County. In Chancery.

TAMPA WATER WORKS COMPANY, Complainant,
vs.
CITY OF TAMPA, Defendant.

This cause coming on to be heard upon demurrer of the defendant to the original bill filed herein, which is insisted upon as applicable to the bill as amended, and upon the motion of the defendant to dissolve the injunction upon the face of the bill as amended, both parties being present by counsel, and the court being advised of its opinion:

It is ordered, adjudged and decreed that the said demurrer be and the same is hereby overruled, and that the said motion to dissolve the temporary injunction heretofore issued herein upon the face of the bill as amended be and the same is hereby denied. And the defendant having announced in open court that it does not desire to plead further, it is therefore ordered, adjudged and decreed that the temporary injunction heretofore issued in said cause be and the same is hereby made perpetual, and that the complainant do have and recover of and from the defendant its costs in this behalf incurred, to be taxed by the clerk of this court; and the defendant then and there *gives* notice and hereby enters its appeal from this decree and the foregoing orders to a day in the next succeed-
39 ing term of the supreme court of Florida, to-wit: the January term, 1903.

Done and ordered at chambers at Tampa, Florida, this the 29th day of December, A. D. 1902.

J. B. WALL, Judge.

And afterwards such proceedings were had in said cause that, on the 28th day of April, A. D. 1903, a decree was rendered in the supreme court of the State of Florida, as follows, to wit:

"It is considered by the court that the interlocutory decrees granting the temporary injunction and overruling the demurrer to the bill, as well as the final decree perpetuating the injunction and awarding costs against the city, are reversed and the cause remanded with directions to sustain the demurrer to the bill, and for such further proceedings as may be agreeable to equity practice and consistent with the opinion of the court herein filed; and it is further ordered that the appellant do recover of the appellee its costs by it in this behalf expended, which costs are taxed at the sum of twenty-six and 27/100 dollars."

And afterwards, to-wit: on the 6th day of June, A. D. 1903, a mandate was issued in said cause from said supreme court, said mandate being in the words and figures following, to-wit:

"Mandate from Supreme Court.

"The State of Florida to the honorable the judge of the circuit court for the sixth judicial circuit of Florida, Greeting:

"Whereas, lately, in the circuit court for the sixth judicial circuit of Florida, in and for the county of Hillsborough, in a cause wherein The Tampa Water Works Company, a corporation under the laws of Florida, was plaintiff, and The City of Tampa, a municipal corporation of the State of Florida, was defendant, the decrees of said circuit court *was rendered* were rendered December 29th, 1902, as by the inspection of the transcript of the record of the said circuit court, which was brought into the supreme court of the State of Florida by virtue of an appeal agreeably to the laws of said State in such case made and provided, fully and at large appears; and whereas, at the January term of said supreme court, holden at Tallahassee, A. D. 1903, the said cause came on to be heard before the said supreme court on the said transcript of the record, and was argued by counsel; in consideration whereof, on the 28th day of April, A. D. 1903, it was considered by said supreme court that the interlocutory decrees granting the temporary injunction, and overruling the demurrer to the bill, as well as the final decree perpetuating the injunction and awarding costs against the city, are reversed, and the cause remanded with directions to sustain the demurrer to the bill, and for such further proceedings as may be agreeable to equity practice and consistent with the opinion of the court herein filed; and it is further ordered that the appellant do recover of the appellee its costs by it in the behalf expended, which costs are taxed at the sum of twenty-six and 27/100 dollars; therefore you are hereby commanded that such further proceedings be had in said cause as according to right, justice, the judgment of said supreme court, and the laws of the State of Florida, ought to be had, the said decrees of the circuit court notwithstanding.

"Witness, the Honorable R. F. Taylor, chief justice of said supreme court, at Tallahassee, this 6th day of June, 1903.

[Seal of the Supreme Court of the State of Florida.]

"B. B. WILSON,
"Clerk Supreme Court of Florida."

Endorsed on the back thereof the following memorandum:

"Memorandum of Costs Taxed by Clerk Supreme Court.

For certified transcript of record and recording entry of appeal	$14.27
Clerk supreme court (chap. 4031)	12.00
	$26.27"

Which said mandate was duly filed in the circuit court of the sixth judicial circuit of the State of Florida on June 11th, 1903.

41 And afterward, to wit, the said cause coming on to be heard before the judge of the circuit court of the sixth judicial circuit of the State of Florida, in and for Hillsborough county, in chancery, the following decree was entered in words and figures following, to wit:

In the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Hillsborough County. In Chancery.

THE TAMPA WATER WORKS COMPANY, a Corporation under the Laws of Florida,
vs.
THE CITY OF TAMPA, a Municipal Corporation of the State of Florida.

Now, on this 15th day of June, A. D. 1903, the said cause above styled coming on to be further heard, both parties being present by their counsel, and it appearing to the court that on the 28th day of April, A. D. 1903, the following order and decree was rendered by the supreme court of Florida, upon the appeal from the order made by this court on the 29th day of December, A. D. 1903, which said decree of the supreme court is in the words and figures following, to-wit:

"It is considered by the said supreme court that the interlocutory decrees granting the temporary injunction and overruling the demurrer to the bill, as well as the final decree perpetuating the injunction and awarding costs against the city, are reversed and the cause remanded with instructions to sustain the demurrer to the bill and for such further proceedings as may be agreeable to equity

practice and consistent with the opinion of the court herein filed; and it is further ordered that the appellant do recover of the
42 appellee its costs by it in this behalf expended, which costs are taxed at the sum of twenty-six and 27/100 dollars."

And it further appearing to the court that the mandate of the supreme court was duly issued on the 6th day of June, A. D. 1903, and duly filed in this court on the 11th day of June, A. D. 1903.

It is thereupon ordered, adjudged and decreed by the court that the temporary as well as the perpetual injunction heretofore granted, be and the same are hereby dissolved; that the demurrer to the said bill be sustained, and that the said bill be and the same is hereby dismissed; no application being made for further proceedings, and it is hereby ordered, adjudged and decreed that the said City of Tampa do have and recover of and from the Tampa Water Works Company the costs of the former appeal in this case, amounting to the sum of twenty-six and 27/100 dollars, with the costs in this case to be taxed by the clerk of this court.

Done and ordered at chambers this 15th day of June, A. D. 1903.

J. B. WALL, Judge.

And thereupon on the same day, the defendant entered its appeal to the supreme court of Florida, which entry of appeal, on the 15th day of June, A. D. 1903, was duly recorded by the clerk of said court in Chancery Order Book "F," at page 418 thereof, in the words and figures following, to-wit:

In the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Hillsborough County. In Chancery.

THE TAMPA WATER WORKS COMPANY, Plaintiff,
vs.
THE CITY OF TAMPA, Defendant.

43 And now comes the complainant in the above-styled cause by its solicitors, Sparkman & Carter and Peter O. Knight, and hereby enters its appeal to the supreme court of Florida from the final decree rendered herein on the 15th day of June, A. D. 1903, in favor of the defendant, The City of Tampa, and from the decrees therein, sustaining the defendant's demurrer to the complainant's bill as amended, and dissolving the temporary and perpetual injunction in said cause; and said appeal is made returnable to the next succeeding term of the supreme court, to-wit: the January term, A. D. 1904, and to the second Tuesday in January, A. D. 1904, the same being the first day of the said January term, A. D. 1904.

THE TAMPA WATER WORKS COMPANY,
By SPARKMAN & CARTER AND P. O. KNIGHT,
Its Solicitors.

And on the same day, to-wit: the 15th day of June, A. D. 1903, the complainant filed its assignment of errors, in the words and figures following, to-wit:

In the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Hillsborough County. In Chancery.

THE TAMPA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF TAMPA, Defendant.

And now comes the complainant in the above-styled cause, The Tampa Water Works Company, by Sparkman & Carter and Peter O. Knight, its solicitors, at the time of the entry of its appeal herein, and hereby makes the following complete assignment of all errors it intends to rely upon for reversal of the decrees appealed from:

First. The court erred in dissolving the temporary injunction issued on the 26th day of December, A. D. 1901, in favor of
44 the complainant and against the defendant, on the ground that the allegations of the bill on file justify the issuing of said temporary injunction.

Second. The court erred in sustaining the demurrer of the defendant to the bill of complaint.

Third. That the court erred in dissolving the perpetual injunction issued in said cause.

Fourth. The court erred in dismissing the complainant's bill of complaint.

SPARKMAN & CARTER AND
P. O. KNIGHT,
Solicitors for Complainant.

We hereby acknowledge receipt of a copy of the foregoing assignment of errors this 15th day of June, A. D. 1903.

JOHN P. WALL AND
MACFARLANE & GLEN,
Attorneys for Defendant.

In the Circuit Court of the Sixth Judicial Circuit of the State of Florida in and for Hillsborough County. In Chancery.

THE TAMPA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF TAMPA, Defendant.

And now comes the complainant in the above stated cause, by its solicitors, Sparkman & Carter and Peter O. Knight, and at the time of entering its appeal herein files these written directions to the clerk

of the court for making up the transcript of the record upon the appeal in said cause:

The said clerk will copy into and make a part of the said transcript the following papers and proceedings in said cause, to-wit:

45 First. The original bill of complaint, filed on the 26th day of December, 1901.

Second. The decree granting a restraining order and temporary injunction, rendered on the 26th day of December, 1901.

Third. The amendment to the bill filed December 29th, 1902.

Fourth. The demurrer to the bill filed December 22d, 1902.

Fifth. The motion to dissolve the injunction filed December 26th, 1902.

Sixth. The final decree rendered on December 29th, 1902.

Seventh. The decree rendered by the supreme court of Florida on the 28th day of April, 1903.

Eighth. The mandate issued by the supreme court on the 6th day of June, 1903.

Ninth. The final decree rendered by the circuit court of Hillsborough county on the 15th day of June, A. D. 1903.

Tenth. The entry of appeal as recorded in Chancery Order Book, filed and recorded on the 15th day of June, A. D. 1903.

Eleventh. The assignment of errors filed with the written directions to the clerk.

Twelfth. These written directions for making up the transcript of the record.

The said clerk will recite in said transcript the filing of the bond of the complainant on the — day of December, A. D. 1901, in accordance with the decree of the court rendered on the 26th day of December, A. D. 1901.

The said clerk will omit from the said transcript all other proceedings and papers filed in said cause.

The clerk will commence making up the transcript of the record on the 1st day of July, A. D. 1903.

SPARKMAN & CARTER AND
P. O. KNIGHT,
Solicitors for Complainant.

46 We hereby acknowledge receipt of a copy of the foregoing directions to the clerk for making up the transcript of the record on this, the 15th day of June, A. D. 1903.

JOHN P. WALL AND
MACFARLANE & GLEN,
Solicitors for Defendant.

I, W. L. Hanks, clerk of the circuit court in and for the county of Hillsborough, State of Florida, in chancery, do hereby certify that the foregoing pages, numbered from 1 to 30, inclusive, contain a correct transcript of the record, judgment and decrees in the case of The

Tampa Water Works Company, complainant, against The City of Tampa, defendant, and a true and correct recital and copy of all such papers and proceedings in said cause as appears upon the records and files of my office that have been directed to be included in said transcript by the written demands of said parties; and I do further certify that the said The Tampa Water Works Company has paid all the costs in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this 24th day of December, A. D. 1903.

[SEAL.]

W. L. HANKS,
Clerk of the Circuit Court for the
County of Hillsborough,
By D. B. GIVENS, D. C.

And afterwards, to-wit: on the 15th day of February, 1904 came the appellant in the said cause, by its attorneys, and submitted the said cause to the said supreme court upon the said transcript of the record and briefs.

And at a subsequent day, to-wit: on the 20th day of February, 1904, judgment was rendered by the said supreme court of the State of Florida, which judgment is in the words and figures as follows, to-wit:

47 Supreme Court of Florida, January Term, A. D. 1904.

TAMPA WATER WORKS COMPANY, a Corporation under the Laws of Florida, Appellant,
vs.
CITY OF TAMPA, a Municipal Corporation under the Laws of Florida, Appellee.

Upon Appeal from Decrees of the Circuit Court within and for the County of Hillsborough.

This cause having been submitted to the court at a previous day of this term upon a transcript of the record of the decrees aforesaid and the argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decrees; it is, therefore, considered, ordered and adjudged by the court that the said decrees of the circuit court be and are hereby affirmed; and it is further ordered that the appellee do recover of the appellant its costs by it in the behalf expended, which costs are taxed at the sum of —; all of which is ordered to be certified to the court below.

The opinion of the court in this cause was this day read, and ordered to be filed.

R. F. TAYLOR,
Chief Justice of the Supreme Court of Florida.

48 I, B. B. Wilson, clerk of the supreme court of the State of Florida, do hereby certify that the foregoing pages numbered from one (1) to forty-seven (47) inclusive, constitute a true copy of all of the proceedings and a correct transcript of the record of the judgment in the case of Tampa Water Works Company, appellant, *vs.* The City of Tampa, appellee, as appears upon the files and records of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said supreme court of Florida, at Tallahassee, this 7th day — May A. D. 1904.

[Seal Supreme Court of the State of Florida.]

B. B. WILSON,
Clerk Supreme Court, State of Florida.

49 In the Supreme Court of Florida, En Banc, January Term, A. D. 1904.

TAMPA WATER WORKS COMPANY, a Corporation under the Laws of Florida, Appellant,
vs.
CITY OF TAMPA, a Municipal Corporation under the Laws of Florida, Appellee.
} Hillsborough County.

Per Curiam :

On the appeal of this case heretofore prosecuted it was considered that the demurrer to the bill herein should be sustained, and the injunction dissolved, but the cause was remanded in order that the complainant might have leave to amend its bill. This it failed to do upon the opportunity being afforded it, and thereupon the court dismissed the bill.

No new questions are presented on this appeal that were not fully considered and settled adversely to the water works company on the former appeal (City of Tampa *v.* Tampa Water Works Company, 45 Fla., —, 34 South. Rep., 631, decided April 28, 1903), and the decrees appealed from must be affirmed.

Taylor, C. J., Carter, Cockrell and Whitfield, JJ., concur.
Shackleford, J., disqualified; Hocker, J., absent.

50 In the Supreme Court of Florida, in Banc, January Term, A. D. 1903.

THE CITY OF TAMPA, a Municipal Corporation of the State of Florida, Appellant,
vs.
THE TAMPA WATER WORKS COMPANY, a Corporation under the Laws of Florida, Appellee.
} Hillsborough County.

Statement.

From the pleadings it appears that on September 20, 1887, the City of Tampa entered into a contract with W. A. Jeter and A. E. Boardman and their associates, constituting the Tampa Waterworks Company, for supplying the city and its inhabitants with water. By this contract the water company agreed to erect waterworks and to supply the city for public purposes in the manner therein stated for a period of thirty years, and the city agreed to pay $4,950 per annum, in equal semi-annual payments, for certain hydrant rentals and if payments were not promptly made vouchers bearing 7 % interest were to be issued therefor. The water company agreed to supply water for certain public purposes in payment of city taxes and licenses for the first ten years, and for water used for fountains the city was to pay at the rate of not more than twenty-five cents per 100 cubic feet. The city agreed to levy an irre-
51 pealable tax sufficient to meet the annual payments, and if it should be authorized to levy a special tax, it obligated to do so annually and to keep the proceeds as a separate fund to be devoted to the payment of hydrant rentals. It further agreed to pass such ordinances as would protect the property of the water company and enforce such penalties and fines upon any person injuring the property as would when divided between it and the water company reimburse the latter for repairs made necessary by such injury, provided the damages should not exceed the fine limited by charter. The city further gave the water company the exclusive right to streets and forbade the laying of pipes through the streets by others for the sale of water during the continuance of the contract, and the water company was accorded the privilege of laying a water pipe through the streets and alleys and crossing all streams in the city under certain restrictions therein declared. It was further agreed that the contract should continue in force for thirty years from the time the waterworks were completed and ready for duty, and that at any time after the expiration of ten years from the completion of the waterworks the city should have the right to purchase the waterworks, together with all appurtenances thereunto belonging, at the value thereof to be agreed upon by the parties, by giving the waterworks company notice of the intention to purchase

one year in advance. It was further stipulated that if the parties could not agree as to the price to be paid for the waterworks and appurtenances, the price should be determined by arbitration in the manner therein provided. It was further agreed that should the city not wish to purchase at the expiration of thirty years, that the contract should be renewed for not less than five years, after which the franchise granted the water company should cease and be reopened for competition, at the option of the city. It was further agreed "that the owners of the said waterworks may charge and collect
52 quarterly in advance, for water furnished private consumers, prices not to exceed the following maximum rates and rules," followed by a list of maximum prices for purposes specified with certain regulations of the use of water by private consumers with a clause that "for all uses not herein specified the price shall be within the discretion of the waterworks company." It was further agreed that as the city grew or should for any reason desire more hydrants, that the water company should erect them and that the city should pay in addition to the $4,950, previously stated, $45 per annum for each additional hydrant under the conditions before stated, and that when the number of hydrants rented by the city should reach 200 the prices for all should be reduced to $40 per hydrant per annum. There are other provisions in the contract not necessary to be set out.

On September 29, 1887, the city passed an ordinance, No. 7, which set out in section 2 the contract of September 20, 1887, and ordained that Jeter and Boardman and their associates, successors and assigns should have the exclusive right and privilege of constructing, maintaining and operating waterworks for public and private supply of water within the city for a term of thirty years, together with the right to lay pipes, erect hydrants, fountains and such other structures and appurtenances in any and all of the streets and other public ways in the city as might be required for the distribution of water, and to make all necessary repairs, upon the conditions mentioned in the contract set forth in section 2. The ordinance prescribed certain regulations for the laying of pipes and other matters not necessary to be specifically mentioned, and obligated the city to locate upon the map of the mains at least 110 fire hydrants for its use, and required the water company in accordance with the contract to extend the water mains when directed so to do by the city, and on such extensions to place additional hydrants.
53 Section 6 is as follows: "It is provided and ordained that the owners of said waterworks may charge and collect quarterly for water furnished private consumers, prices not exceeding the price named in section 2 of this ordinance." No prices were named in section 2, but the contract containing the provisions as to prices was as stated made a part of that section. Section 7 is as follows: "As provided in section 2 of this ordinance the City of Tampa shall levy and collect no municipal tax against the waterworks, upon its stock or earnings or upon material entering into their construction or

operation during a period of ten years from the passage of this ordinance." Section 8 required the water company by or before January 1, 1888, to commence work upon said waterworks after having filed a written acceptance of the ordinance with the city clerk, and to complete the waterworks and have them in operation by January 1, 1889, and provided for forfeiture of the privileges granted upon non compliance with such requirements. Section 11 provided for the levy and collection annually of a tax of five mills to be applied exclusively to the payment of obligations of the city to the water company. Fines of not less than $25, nor more than $100, were prescribed for wilful and malicious injuries to the company's property. By section 12 the city approved, ratified and confirmed the contract mentioned in section 2, and undertook to guaranty payment of interest to accrue upon $82,500 of bonds to be issued by the water company, bearing interest at the rate of 6 % per annum, payable semi-annually, for a period of thirty years, such interest coupons to be made payable at the office of the city treasurer, and to be receivable for taxes and other debts and obligations due the city, and it was provided that the coupons when paid by the city treasurer should be a receipt and acquittance in discharge of said sum of $4,950 agreed to be paid by the city annually to the water company for the rental of 110 hydrants, to the extent and amount of
54 the coupons so paid.

On June 6, 1889, the city passed another ordinance, No. 42, which, after reciting the rapid growth of the city, directed the water company to extend its mains and provided for the erection of twenty-seven additional hydrants for which the city agreed to pay the sum of $1,215 per annum as provided by the original contract. Section 12 of the former ordinance was amended so as to read, after the first sentence, to the effect that the city ratified, approved and confirmed the contract entered into with the water company with the amendments contained in that ordinance, and obligating the city to guaranty the interest to accrue upon bonds which might be issued by the water company on January 1, 1890, to an amount not exceeding $102,000, bearing interest payable semi-annually at 6 %, for the period of the unexpired term of the franchise granted the water company, the interest coupons to be made payable, less the exchange, in the city of New York, or at the office of the city treasurer, and to be receivable for taxes and all other debts and obligations of the city.

On February 6, 1890, the city passed another ordinance, No. 51, which recited the two former ordinances and stated that questions had arisen as to the true intent and meaning of the provisions in ordinance No. 7, by which the city reserved the right to purchase the waterworks property, whereby the company had encountered difficulty and been delayed in raising money needed to complete the waterworks, and that it had become necessary to change the time of the issuance of the bonds proposed to be issued by the water company, and that it was to the interest of the city that the waterworks

should be completed at as early a date as possible, and desirable that the right of the city should be free from doubt, and ordained that the true intent and meaning of ordinance No. 7,
55 was to reserve to the city the right to purchase at any of the periods therein designated all the property of every kind belonging to the waterworks company, including the franchises and privileges granted by the former ordinance and then enjoyed by the company, and that in case of failure to agree upon the price, that the value of the property, including the franchises and privileges, should be determined by arbitrators in the manner provided in the former ordinance. It further ordained that the provisions of ordinance No. 42, looking to the issue of $102,000 of bonds by the water company on January 1, 1890, and to the payment of interest on same in New York, be amended so that said amount of bonds might be dated March 1, 1890, and the interest made payable in Baltimore or such other place as might be designated by the water company, provided that the amount of bonds and the interest to be paid should not be altered, and that the first payment of rental should be on July 1, 1890. It was further ordained that if the city should exercise the reserved right to purchase the property of the water company and same should be mortgaged to secure bonds of the company not then due, the city should have the right to have the amount of the outstanding bonds deducted from the price to be paid, the amount so deducted to be payable by the city only at maturity of the bonds.

On January 24, 1899, the city filed its bill in chancery against the water company in the circuit court of Hillsborough county, setting forth therein and making exhibits thereto ordinances Nos. 7, 42 and 51, alleging in substance that the water company had failed to furnish sufficient water pressure, or water in sufficient quantity to give first class fire protection; that the city had no right or power to contract with the company to furnish water for a period of thirty years, or bind itself to guaranty interest on the company's bonds, or to fix the rates to be charged consumers for a period of thirty years; that it had the
56 right at any time to change such rates and to substitute lower rates therefor; that the company had not at all times furnished the pressure or quantity or quality of water as agreed; that the contract between the company and the city was null and void and should be cancelled; that under and by virtue of ordinance No. 199 passed by the city and approved February 26, 1898, providing for the repeal of ordinances Nos. 7 and 42, said ordinances Nos. 7, 42 and 51 had been repealed, and praying that the contract and ordinances Nos. 7 and 42 and 51 be declared null and void and in no way binding upon the city; that the city be released from all its obligations under said contract and ordinances; that so much of the contract as provided for an exclusive right on the part of the company to maintain its mains in the city and binding the city to take water from the company for a term of thirty years, at the rates

therein mentioned be declared null and void; that so much of the contract as stipulated that the city should guaranty the payment of the interest on the bonds issued by the company be declared null and void; that so much of the contract as provided for the taking of water by the citizens at the rates stipulated in the contract, and the right of the company to cut the water off from the premises and the payment therefor of fifty cents to have the same turned on again might be declared null and void, and that the entire contract be set aside and declared null and void, and for such further relief in the premises as might seem meet and proper. The water company filed its answer to this bill admitting the passage of the ordinances as therein set forth, but denying that it had failed to furnish a sufficient quantity of water to give the pressure provided for by the contract, or to give first class fire protection, claiming that it furnished water both in quantity and quality as it had agreed, and that it had complied in every particular with its contract. The answer denied
57 that the contract was null and void on account of anything mentioned in the bill or that it should be cancelled therefor; denied the right and power of the city to pass or enforce ordinance No. 199, and alleged that said ordinance impaired the obligation of said contract, and was null and void because it violated the constitution of Florida and also the Constitution of the United States, especially article I, section 10, and the fourteenth amendment thereto. The answer also alleged as a ground of demurrer that there was no equity in the bill and claimed the same benefit as if the company had demurrer to the bill.

On October 4, 1899, shortly after the answer to this bill was filed, the city and the water company entered into an agreement whereby the water company agreed that from and after January 1, 1900, it would reduce the water rates specified in the contract to the rates therein specified including a reduction on fire hydrants from $40 to $35, with the privilege of placing thirty additional hydrants immediately and certain others in the future, in consideration of which the city agreed to dismiss all suits pending between it and the company, to pass and enforce certain ordinances to protect the company's property and for other purposes, to pay for the additional hydrants at the rental specified, and that during the life of the contract the city would not enter into competition with the company in supplying water to the city and its inhabitants; and further agreed that on failure to pay hydrant rentals and water charges for the space of twelve months after same became due, all the rates and charges set out in the original contract between the city and the water company should at once become operative and be in force, and the reduction specified in the last agreement to be thereafter of no further force or effect. This last agreement was not incorporated into or ratified by an ordinance, but the city passed a resolution, approved the same day, incorporating the contract therein and directing that it
58 should be executed by the mayor, president of the council and city auditor on behalf of the city, and that the agreement should become operative immediately according to its terms.

The resolution recited that there was in existence and force a valid contract between the city and the water company; that such contract was thereby recognized by both parties as binding on them; that there was then pending in chancery in the circuit court of Hillsborough county certain litigation between the city and the water company over the construction of the contract; that it was to the mutual interest of both parties that said litigation should be terminated, and that the parties had come to the agreement before stated. In pursuance of the agreement incorporated into the resolution the city by its attorney filed a præcipe for the dismissal of the chancery suit then pending in the circuit court of Hillsborough county, whereupon the clerk of the court entered an order dismissing same as follows:

"OCT. 9TH, 1899.

Præcipe for dismissal, and suit hereby dismissed.

H. L. MITCHELL, Clerk,
By C. M. KNOTT, D. C."

On December 20, 1901, the city passed an ordinance whereby it was declared to be unlawful for any individual, company or corporation furnishing water to the city or its inhabitants to charge or collect any higher rates for water than those specified in that ordinance, from and after January 1, 1902. Punishment by fine or imprisonment, or both, for violations of the ordinance was imposed. Section 2 of that ordinance provides "that the maximum rates to be charged by any individual, company or corporation furnishing water to the city of Tampa and the inhabitants thereof shall be as follows," specifying maximum rates which are less than those mentioned in the original contract and subsequent modifications thereof.

On December 6, 1901, the water company filed its bill against the city which, as subsequently amended, set forth the foregoing facts and alleged that the city, being authorized by its char-
59 ter to obtain a supply of water for public purposes and also for its inhabitants, entered into the contract with Jeter and Boardman before set out and thereby agreed that Jeter and Boardman and their associates should become incorporated under the laws of this State for the purpose of supplying the city and its inhabitants with water, and that upon the formation of such corporation the contract should be assigned to it; that afterwards Jeter and Boardman and their associates formed the water company and assigned and transferred all the rights, franchises and privileges conferred upon them by the city to said corporation; that from time to time thereafter the city ratified and confirmed the original contract made in 1887, and afterwards, on June 6, 1899, and again on October 4, 1899, confirmed the contract to the water company with certain changes therein; that at sundry other times since the making of the contract the city confirmed, ratified and recognized said contract as binding upon both parties; that the company was incorporated under the general incorporation laws of Florida as they existed in

1887, solely for the purpose of engaging in the business of furnishing a public and private supply of water to the city and its inhabitants, and acquired all the rights, powers and privileges conferred upon corporations of a like nature at the time of its incorporation, among which were those granted by the statute then in force (sec. 30, p. 234, McClellan's Digest), which provided that "any corporation organized and put into successful operation under this chapter shall have exclusive privileges for the purposes of its creation for the term of twenty years from the date the corporation commenced to carry out in good faith the terms of its articles of incorporation, *provided, however*, that this instrument shall not so operate as to divest any future legislature of those powers of government which are inherent and essential attributes of sovereignty, to-wit: the power to create revenue for public purposes, to provide for the common defense, to provide safe and con-
60 venient ways for the public necessity and convenience and to take private property for the public use and the like;" that in 1888, prior to any change in the statutes, the company put into successful operation its waterworks and continued same up to the filing of the bill; that the contract was legal and valid, protected from impairment by the constitution of Florida, and particularly by the Constitution of the United States and the amendments thereto; that the company performed all the covenants and agreements on its part as set out in said contract, and was at the time of filing the bill performing in good faith the covenants on its part contained in said contract; that the service furnished had been accepted by the city, and the plant erected was within the time limited in the contract duly accepted and approved by the city; that by the original contract certain rates for furnishing water to the city and its inhabitants were agreed upon and incorporated therein which were the sole consideration moving it to the undertaking and carrying out of said contract; that the prices to be paid for water by the city and the inhabitants were fixed for the entire period of thirty years during which the contract was to be in existence; that the company had up to the time of the amended contract of October 4, 1899, charged and collected from the city of Tampa and from its inhabitants the amounts specified to be charged in said original contract; that at the time the waterworks plant was installed, the city was a very small village; that the inducement to invest money in the plant was that the rates so fixed in the contract should be charged during the entire time thereof, the company hoping and expecting that the city would so grow that it would be able to make a reasonable interest on its investment; that by October 4, 1899, the city had largely grown and increased in size; that the company at the request of the city investigated the conditions existing at
61 that time, and by a mutual agreement of that date decided that it could reasonably make certain reductions in the rates which it was authorized under its original contract to charge both the city and its inhabitants, and by mutual agreement that day

entered into the rates were changed in certain respects mentioned in the resolution of October 4, 1899; that since making said last mentioned contract the company had been furnishing water to the city and its inhabitants at the rates therein specified, which rates had been paid by the city and its inhabitants; that on December 20, 1901, the city disregarding its obligations to the company and in contravention of the constitution and laws of the State, and particularly in violation of that section of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of a contract, and particularly in violation of the fourteenth amendment to the Constitution of the United States, passed and had signed by the mayor the ordinance reducing water rates before mentioned; that said ordinance had been published as required by the charter of the city and if legal and valid would go into effect on or about December 28, 1901; that the city did not have power to pass said ordinance; that the ordinance violates the contract rights of the company, constitutes the taking of its property without due process of law, and impairs the contract theretofore entered into between it and the city. The bill also alleged that the matters set forth in the bill filed by the city against the company in 1899, and the answer thereto, including the question as to the legality of the contract in all its details, as also the right to contract for a period of thirty years, and the right of the city to change the rates to be charged consumers as fixed in said original contract without the company's consent, were raised and presented in said proceedings, and were, by reason of the order and decree finally dismissing said suit, determined and adjudicated against the contention
62 of the city; that said former bill and the proceedings and order dismissing same remain determined, in full force and are *res adjudicata;* that said determination was the law of the case; that the city had no right to interfere with said contract or in any way to reopen the questions so adjudicated in this or any other suit with the company.

The bill further alleged that the company's only remedy was in a court of equity; that the law furnished it no adequate remedy or relief in this; that by said ordinances of December 20, 1901, the charging of the contract rates for water was made a penal offense against the company, and numberless quasi-criminal prosecutions would grow out of the attempt to enforce the company's legal rights; that the inhabitants of the city acting under the supposed right of the city to so invalidate water charges would decline to pay the contract rates and the company would be required to institute numberless suits in order to collect the amounts of money due it; that the company would suffer irreparable damage unless the court of equity should interpose to protect its rights. The bill prayed that the city, its agents and officers be enjoined temporarily during the pendency of the suit, and perpetually at the hearing, from enforcing or attempting to enforce the ordinance reducing rates for furnishing

water to the city and its inhabitants, for general relief and for subpœna.

On December 26th, 1901, temporary injunction issued as prayed.

The city filed its demurrer to the bill, incorporating therein the following grounds: 1st. The bill was wholly wanting in equity.

2nd. The ordinance of December 20, 1901, was valid under chap. 5070, Acts of 1901.

3rd. The alleged contracts between the city and the company were *ultra vires* and void.

4th. The city had no authority to agree upon water rates
63 for the period alleged in the bill.

5th. The company has a full, adequate and complete remedy at law.

6th. The alleged contracts are unconscionable and contrary to public policy.

7th. If the company acquired any rights under the alleged contracts, they were acquired subject to future legislation, and such legislation can not be construed to impair the obligation of a contract.

8th. The company acquired no rights by virtue of its alleged incorporation.

9th. The former proceedings set up as a bar did not terminate in a final adjudication on the merits, do not sustain a claim of *res adjudicata*, and the city could not bind itself to impart validity to the alleged contracts by dismissing its bill as alleged.

Thereafter the city filed its motion to dissolve the temporary injunction upon grounds similar to the first eight grounds of the demurrer, and the motion and demurrer coming on for hearing on December 29, 1902, the court overruled the demurrer, and denied the motion to dissolve, and, the city declining to plead further, a final decree was entered perpetuating the temporary injunction theretofore granted and adjudging costs against the city, from which decree the present appeal was entered by the city. The errors assigned complain that the court erred in the following particulars:

1. Granting the temporary injunction.
2. Overruling the demurrer to the bill.
3. Denying the motion to dissolve the temporary injunction.
4. Granting the final decree perpetuating the injunction.
5. Holding by its decrees that the company was entitled to any relief.

64 CARTER, J. (*after stating the facts*):

This cause was referred to and the oral arguments heard by division B of this court, but the questions involved were by that division deemed of sufficient importance to require the case to be considered and decided by the court *in banc*.

Although one of the grounds of demurrer to the bill was that the remedy at law is plain, adequate and complete, that ground is not insisted upon in this court. Indeed, counsel for the city state in

their briefs that the city desires to waive any technical objections to the sufficiency of the bill, as well as to the jurisdiction of a court of equity in the premises.

By chapter 3779, act approved June 2, 1887, the City of Tampa was constituted a body corporate and politic, and in section 1 it was given power to sue and be sued, to plead and be impleaded, to purchase and hold real, personal and mixed property, and to dispose of same for the benefit of the city, and "to do all other acts for that purpose as material persons."

By section 2 it was provided that the "city council shall have power to make, ordain, establish and execute for the government of said city such ordinances in writing * * * not inconsistent with the constitution or laws of this State or of the United States * * * as they shall deem necessary, * * * to provide for the establishment of waterworks, * * * to prescribe and maintain a system of drainage and sewerage, * * * to organize and provide a fire department, and to regulate the same so as to protect the city from fire, * * * and to do and regulate any other matter or thing that may tend to promote the peace, health, welfare, prosperity and morals of the said city, * * * and in addition to the powers hereinbefore enumerated the said city council shall have all the powers and perform all the duties imposed upon them by the laws of Florida now in force or which may hereafter be enacted, providing for the creation and government of cities and towns."

By section 12 it was provided that "all laws now in force or that may hereafter be enacted for the government of cities and towns, except in so far as they may conflict with the provisions of this charter, shall apply to the said municipality."

The general law for the incorporation of cities and towns in force at the time the contract between the city and Jeter and Boardman was made, provided that a city or town organized under its provisions should be "a body corporate, with full power and authority to take and hold property, real, personal and mixed, to control and dispose of the same for the benefit and best interests of the corporation aforesaid, to sue and be sued, implead and be impleaded, and to do all such other acts and things as are incident to corporate bodies" (sec. 8, McClellan's Digest), and that "the city or town council shall have power * * * to construct drains and sewers" (sec. 17 *idem*), and "to make and sink wells, erect pumps, dig drains; to pass all necessary laws to guard against fire * * * and to do and perform all such other act or acts as shall seem necessary and best adapted to the improvement and general interest of the city or town" (sec. 21, *idem*). Chapter 3605, act approved February 16, 1885, empowered cities and towns to "levy and collect a special tax annually for waterworks and fire protection upon all property within the corporate limits," not to exceed five mills, to be levied by a two-thirds vote of the council after publication of notice of the intention so to do. The provisions quoted were the only statutory provisions in force

relating to the power of the City of Tampa to contract for
66 water for the city and its inhabitants at the time the contract with Jeter and Boardman was made. The city contends that these powers, some being in the nature of "general welfare" clauses, others special with regard to the establishment of waterworks and protection from fire, interpreted according to the rule of construction followed in Mernaugh *v.* City of Orlando, 41 Fla. 433, 27 South. Rep. 34, did not authorize the city to delegate to a private corporation by contract the authority to construct, own and operate a water plant, but that the power given required it to provide for establishing waterworks by arranging for its own ownership and operation of waterworks.

The city also contends that even of the power to contract with the water company be found to exist, that power should not under the rules of construction announced in Jacksonville Electric Light Co. *v.* City of Jacksonville, 36 Fla. 229, 18 South. Rep. 677, and Florida Cent. & P. R. Co. *v.* Ocala St. & S. R. Co., 39 Fla. 306, 22 South. Rep. 692, be held to authorize the making of a contract to continue for a period of thirty years with provision for a renewal for a further period of five years, nor to authorize the fixing of rates to be paid for the entire period not only for water used by the city, but by its inhabitants.

The city further contends that even if the power granted enabled it to make the contract, it had not under the rulings in Florida Cent. & P. R. Co. *v.* Ocala St. & S. R. Co., 39 Fla. 306, 22 South. Rep. 692, and Capital City Light & Fuel Co. *v.* City of Tallahassee, 42 Fla. 462, 28 South. Rep. 810, power to grant an exclusive franchise to the water company, nor under the ruling in City of Tampa *v.* Kaunitz, 39 Fla. 683, 23 South. Rep. 416, power to exempt the property of the company from taxation for the consideration expressed in the contract, nor power to guaranty interest on the company's bonds because forbidden by section 10, article IX, constitution of 1885, nor power
to agree to levy the special tax of five mills, as such tax could
67 under chapter 3605, Acts of 1885, be levied only after publication of the notice required by that statute, nor power to agree to divide fines with the water company, because contrary to public policy, and that the subsequent agreement to compensate the company for its franchise upon purchase of the property was without consideration and beyond the power of the city to make, and that the agreement of October 4, 1899, was void because made without compliance with the provisions of chapter 4146, Acts of 1893, requiring agreements between cities and water companies to be ratified by a majority of the freeholders of the city, and that these illegal provisions, being inseparable from the valid provisions, taint the entire contract with illegality and render it void. In the same connection it is urged that the bill alleges that the fixing of the stated maximum rates for the entire period was the sole consideration upon which the water company entered into the contract, and that as the city had no power to fix those rates, there was no

consideration to the water company and consequently the entire contract is necessarily invalid; and further, that the provision for the exclusive franchise in the water company is not merely *ultra vires*, but illegal, and being an inseparable part of the consideration, renders the entire contract void.

The water company contends that the statutory powers which we have quoted gave the city authority to contract with a private corporation to establish and operate water works, and to agree in such contract upon rates for the public and private supply of water during the period provided by the contract; that the contract so entered into was valid, and likewise every provision thereof when properly construed, and that even if originally beyond the power of the city to make, it has subsequently been ratified and confirmed by both the city and the legislature. Other contentions of the parties will be noticed further on.

The questions presented are interesting and novel, but we
68 shall not undertake to discuss and decide them all at this time, as we do not find it necessary to do so. In the discussion of the case we shall assume, without deciding, that the powers granted the city were sufficient to authorize it to contract with the water company for a public and private supply of water. We shall assume that the powers asserted to have been granted were sufficient to enable the city to insert *cal*uses fixing the rates and obligating the city to pay those rates for water used by it during the entire contract period, although this is a doubtful question. We shall assume that the powers asserted have been granted were sufficient to enable the city to insert a clause fixing the rates to be paid by individuals for water used during the entire contract period, although this is a very doubtful question. We shall also assume that the proper construction of the provisions of the contract relating to maximum rates to be paid for water by individuals requires us to hold that the city thereby granted the water company the right to fix the rates to be paid at such sums as it saw proper, not to exceed the maximum established by the contract, and thereby, if it could lawfully do so, surrender the governmental power to require the company to charge reasonable rates only, which is also a very doubtful question.

Assuming that the statutory powers quoted were broad enough to authorize the city to contract with the water company for a public and private supply of water for a period of thirty years, and to fix the rates to be paid by the city and individuals for the entire contract period, two questions arise. Was the obligation of the contract so made impaired by the ordinance reducing those rates, passed December 20, 1901? Would the enforcement of that ordinance result in depriving the company of its property without due process of law? In the discussion of these questions it must be borne in mind that there is no allegation in the bill that the rates fixed by
69 the ordinance of December 20, 1901, are not reasonable, and our decision must, therefore, be based upon the assumption

that the rates so fixed are reasonable. The questions presented for decision may, therefore, be more accurately stated thus: Does the ordinance of December 20, 1901, fixing reasonable rates to be charged by the water company impair the obligation of the contract between it and the city, whereby higher rates were fixed for a period not yet expired? Will the enforcement of that ordinance result in depriving the company of its property without due process of law?

It has frequently been held, and is unquestionably the law, that unless prohibited by constitutional limitations, or restrained by valid contract obligations, the legislature has power to require water companies to supply their customers, whether cities or individuals, at reasonable prices to be fixed by the legislature or by municipal authorities. Such companies, deriving their authority from the legislature and being invested with the franchise of supplying municipalities and their inhabitants with water through the instrumentality of pipes and mains laid in the public streets, are performing services of a public nature within the meaning of section 30, article XVI, constitution of 1885, and their business is "affected with a public interest" so as to subject them to regulation by requiring them to charge reasonable rates, and such regulation does not violate the "due process" clause of the Federal Constitution. Spring Valley Waterworks *v.* Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48; Freeport Water Company *v.* Freeport City, 180 U. S. 587, 21 Sup. Ct. Rep. 493; Rogers Park Water Company *v.* Fergus, 180 U. S. 624, 21 Sup. Ct. Rep. 490. See also, Los Angeles *v.* Los Angeles City Water Company, 177 U. S. 558, 20 Sup. Ct. Rep. 736; Mayor etc. of City of Knoxville *v.* City of Knoxville Water Co., 107 Tenn. 647, 64 S. W. Rep. 1075. See, also, Knoxville Water Co. *v.* Knoxville, decided by the United States Supreme Court, October term, 1902, 23 Sup. Ct. Rep. 531.

The ordinance of December 20, 1901, was passed in pur-
70 suance of the power granted by chapter 5070, act approved May 31, 1901, which provides "that the corporate authorities of any city, town or village now or hereafter incorporated under any general or special law of this State in which any individual, company or corporation has been, or may hereafter be, authorized by such city, town or village to supply water to such city, town or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation to such city, town or village and the inhabitants thereof; such charges to be just and reasonable; provided, that this act shall not be so construed as to impair the validity of any valid contract heretofore entered into between any city, town or village and any person, firm or corporation for the supply of water to such city, town or village or its inhabitants. But this act shall not be held to validate any contract heretofore made." It is not claimed that this act does not grant the power to pass the ordinance of December 20, 1901,

provided that ordinance does not impair the validity of the contract with the water company or deprive it of its property without due process of law. The act is clearly sufficient to grant the power stated. Freeport Water Company *v.* Freeport City, *supra.* In order to determine whether the ordinance impairs the validity of the contract with the water company, we must determine the nature of that contract.

The city contends that at the time the water company and the city were incorporated, and at the time the contract between them was made, there existed certain provisions of our present constitution which entered into and became a part of the contract between the parties, and that because of these provisions the legislature could grant the power contained in chapter 5070, above quoted, without impairing any obligation of the contract. These provisions are
71 the first clause of section 8, article VIII, that "the legislature shall have power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers and to alter or amend the same at any time," and section 30, article XVI, that "the legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discriminations and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature, and shall provide for enforcing such laws by adequate penalties or forfeitures." Without expressing an opinion as to whether the provisions of section 8, article VIII, accomplish the result claimed, we are satisfied that with section 30, article XVI of the constitution in force now and at the time the city and the water company were incorporated, and at the time the contract was made, the fixing by ordinance of reasonable rates for the supply of water to the city and its inhabitants in pursuance of the power conferred by chapter 5070 neither violates any contract right of the water company, nor deprives it of its property without due process of law. The constitution of 1885, containing this provision, went into effect on January 1st, 1887. See ordinance No. 1 of the convention that framed it. The charter of the present city of Tampa, as well as the charter of the water company, were granted and the contract in question was entered into after the constitution went into effect, and the powers granted to the city and the water company to contract, as well as the contract entered into, must be construed in connection with and limited by the constitutional provision referred to. This provision was considered and partially construed in State *ex rel.* Lamar *v.* Jacksonville Terminal Company, 41 Fla. 377, 27 South. Rep. 225. It was there said that "it does not purport to confer a power or to point out the manner in which a power shall be exercised.

The section was inserted in response to a popular demand
72 for some provision upon the subject. It does not grant the legislature a power. It expressly recognizes a power and declares that it does exist. The provision is a specific declaration

that the power exists in the legislature to be exercised at any time, and because of its importance, and possibly to guard against the misinterpretations of other provisions to impair or deny the power, it was specifically mentioned and declared in the constitution." The power mentioned in this section is full power; a continuing, ever present power. Being irrevocably vested by this section, the legislature can not divest itself of it. Neither can it bind itself by contract, nor authorize a municipality—one of its creatures—to bind it by contract, so as to preclude the exercise of this power whenever in its judgment the public exigencies demand its exercise. Full power can not exist, if by contract that power can be curtailed or impaired. Without this section the power to regulate rates would exist under the general grant of legislative power in section 1, article III, but such power could be surrendered by a contract made by the State or by a municipality by its authority. With this section in force the power to surrender by contract the right to regulate rates is taken away, for the authority to surrender can not co-exist with the ever present continuing power to regulate, which is declared by this section to exist in the legislature. The section in question does not operate to prevent the legislature from making contracts itself, nor from authorizing municipalities to make them and in and by such contracts stipulating for certain rates which will be valid and binding obligations so long as the legislature does not exercise or authorize municipalities to exercise the power to prevent excessive charges which is declared by the section to be vested in the legislature. But every charter granted and every contract made by the legislature, or by
73 a municipality under its authority, are accepted and made subject to and in contemplation of the possibility of the subsequent exercise of the power to prevent excessive charges which by this section is unalterably and irrevocably vested in the legislature. The section not only becomes a part of every such contract, as much so as if written therein, but by implication it denies the authority of the legislature to bind itself either by a contract of its own making, or one made by a municipality under its authorization, not to exercise the power thereby recognized whenever in its wisdom it should think necessary so to do. The effect of this section is to reserve to the legislature full power at all times, notwithstanding any supposed contract not to exercise it, to require water companies and others mentioned in the section to comply with their common law obligation to supply their customers at reasonable rates, and such being its construction we do not see that the contract between the water company and the city is impaired by the ordinance of December 20, 1901, nor that the water company is thereby deprived of its property without due process of law. Skaneateles Water Works Company *v.* Skaneateles, 184 U. S. 354, 22 Sup. Ct. Rep. 400. We have not been able to find an authority construing a constitutional provision precisely like the one we are considering, but we think the decision of the Supreme Court of the United States in Spring Valley

Water Works *v.* Schottler, *supra*, fully sustains the views we announce, and that the decisions holding that constitutional or statutory provisions to the effect that charters granted shall be subject to alteration, amendment or repeal become parts of contracts made in the form of charters, enforce the same principles we apply in this case. Tiedeman on *State and Federal Control of Persons and Property*, sections 208–212; Northern Central Railway Co. *v.* State of Maryland, — U. S. —, 23 Sup. Ct. Rep 62; Bienville Water Supply Company *v.* City of Mobile, 186 U. S. 212, 22 Sup. Ct. Rep. S. C. 16 Am. & Eng.
74 Crop. Cas. (N. S.) 534; Covington *v.* Kentucky, 173 U. S., 231, 19 Sup. Ct. Rep. 383; Citizens' Savings Bank of Owensboro *v.* Owensboro, 173 U. S. 636, 19 Sup. Ct. Rep. 530; Louisville Water Co. *v.* Clark, 143 U. S. 1, 12 Sup. Ct. Rep. 346; Sioux City Ry. Co. *v.* Sioux City, 138 U. S. 98, 11 Sup. Ct. Rep. 226; State *ex rel.* Cream City Ry. Co. *v.* Hilbert, 72 Wis. 184, 39 N. W. Rep. 326. The water company contends that the section we are construing applies only to common carriers engaged in transporting persons and property or in performing other services of a public nature, but we think the section applies to persons and corporations engaged as common carriers in transporting persons and property, and also to persons and corporations performing other services of a public nature. This was the construction placed upon it in State *ex rel.* Lamar *v.* Jacksonville Terminal Company, *supra*, and we have no doubt it is correct.

It is also contended by the water company that the section referred to is not self executing, and therefore cannot be enforced without legislation, but we fail to see the force of this contention. That the provision became effective on January 1, 1887, is not, and cannot successfully be, denied. It does not in and of itself purport to fix reasonable rates, nor to prevent abuses and unjust discriminations, and in that respect it is not self executing, but to the extent that it affirms and declares full power in the legislature to do those things it is effective without legislation, and to the extent that it by implication deprives the legislature of the power to barter away that right it is effective without legislation, and to the extent that it becomes a part of every contract made by the legislature or by a municipality under its authority with the persons and corporations therein mentioned the section is effective without legislation. A constitutional limitation intended as a restraint upon the
75 power of the legislature upon so important a subject that would not become effective until the legislature saw proper to legislate it into effectiveness would be an anomaly in constitutional law. We do not think this provision is of that character.

Having disposed of the case upon the assumption that the contract between the city and the water company was authorized by a proper construction of the powers granted the city by the legislature, it becomes unnecessary to consider the question of its subsequent ratification by conduct on the part of the city, and by certain pro-

visions of the Revised Statutes and chapter 4883, Acts of 1889, which it is claimed validated the contract. The water company contends, however, that the order dismissing the former bill brought by the city against it, operated as an adjudication of all the matters sought to be litigated in that suit, including the right of the city to reduce water rates, the only point in issue here. Without deciding that an order of dismissal made by the clerk upon præcipe of counsel for complainant will have the effect contended for, but assuming for the purposes of this case that it does, we fail to see that the question now in issue was involved in the former proceedings. In that case the city had attempted to repeal the ordinances constituting the contract between it and the water company, and also sought to have the contract declared void because of a want of power to insert certain provisions therein, and to have the contract cancelled upon the ground that the company had failed to perform it, but the question of the power of the city under chapter 5070, Acts of 1901, or any similar previous statute to reduce water rates from the contract price to a less but reasonable rate, which is the only question involved here, was in no manner involved in those proceedings. The issues in the two cases are not, for the reasons stated, the same, consequently the supposed adjudication in the former pro-
76 ceeding can have no effect upon the present case.

The interlocutory decrees granting the temporary injunction, and overruling the demurrer to the bill, as well as the final decree perpetuating the injunction and awarding costs against the city, are reversed, and the cause remanded with directions to sustain the demurrer to the bill, and for such further proceedings as may be agreeable to equity practice and consistent with this opinion.

Shackleford, J., being disqualified, took no part in the consideration of this case.

77 I, B. B. Wilson, clerk of the supreme court of the State of Florida, do hereby certify that the foregoing page numbered forty-nine (49) constitutes a true copy of the opinion of the supreme court of the State of Florida in the case of Tampa Water Works Company, a corporation under the laws of Florida, appellant, *vs.* City of Tampa, a municipal corporation under the laws of Florida, appellee, which was filed in my office on the 20th day of February, 1904; and that the foregoing pages numbered from fifty (50) to seventy-six (76) inclusive, constitute a true copy of the statement and opinion of the supreme court of the State of Florida in the case of The City of Tampa, a municipal corporation of the State of Florida, appellant, *vs.* The Tampa Water Works Company, a corporation under the laws of Florida, appellee, which was filed in my office on the 28th day of April, 1903; and that the latter is a true copy of the opinion referred to in the opinion appearing on page forty-nine (49); all of which appear upon the files and records of my office.

In testimony whereof I have hereunto set my hand and affixed

the seal of the said supreme court of Florida, at Tallahassee, this 7th day of May, A. D. 1904.

[Seal Supreme Court of the State of Florida.]

B. B. WILSON,
Clerk Supreme Court, State of Florida.

78 In the Supreme Court of the State of Florida, January Term, A. D. 1904.

THE TAMPA WATER WORKS COMPANY, Appellant,
vs.
THE CITY OF TAMPA, a Municipal Corporation under the Laws of the State of Florida, Appellee.

Comes now the appellant in the above entitled cause and intending to apply to the Supreme Court of the United States for a writ of error to review the decree of the court in the foregoing cause, and files this its assignment of errors upon which it will rely in the prosecution of the said writ of error in the above entitled cause:

First. The said supreme court of the State of Florida erred in its decree rendered the 20th day of February, A. D. 1904, affirming the decree rendered by the circuit court of the sixth judicial circuit of the State of Florida for Hillsborough county in chancery, in which said decree of the court below it was decreed first, that the demurrer filed by the City of Tampa to the bill of complaint of the Tampa Water Works Company be sustained; second, that the temporary injunction therefore granted in said cause be dissolved; and third that the said bill of complaint filed by The Tampa Water Works Company *vs.* The City of Tampa, be dismissed.

Second. The supreme court of the State of Florida erred in
79 decreeing that the demurrer filed by the City of Tampa to the bill of complaint of the Tampa Water Works Company in said cause be sustained.

Third. The supreme court of the State of Florida erred in decreeing that the bill of complaint of The Tampa Water Works Company *vs.* The City of Tampa, be dismissed.

Fourth. The supreme court of the State of Florida erred in holding that ordinance number 274 of the city of Tampa regulating water rates was not in violation of the fourteenth amendment of the Constitution of the United States.

Fifth. The supreme court of the State of Florida erred in holding that ordinance number 274 of the city of Tampa regulating water rates was not in violation of section ten of article I of the Constitution of the United States prohibiting States from passing laws impairing the obligation of contracts.

Sixth. The supreme court of the State of Florida erred in holding that chapter 5070 of the Acts of the Legislature of the State of

Florida, A. D. 1901, granting the power to certain cities to regulate water rates was not in violation of the fourteenth amendment to the Constitution of the United States, and that it was not the taking of the property of the water works company without its consent, without compensation and without due process of law.

Seventh. The supreme court of the State of Florida erred in holding that chapter 5070 of the Acts of the Legislature of Florida A. D. 1901, was not in violation of section ten of article I of the Constitution of the United States prohibiting States from passing laws impairing the obligation of contracts.

Eighth. The supreme court of the State of Florida erred in holding that chapter 5070 of the Acts of the Legislature of Florida A. D. 1901, and ordinance number 274 of the city of Tampa passed in pursuance thereof were authorized by section 30 of article XVI of the constitution of the State of Florida.

80 Ninth. The supreme court of the State of Florida erred in holding that the right to regulate water rates fixed by contract between the City of Tampa and the water works company prior to the passage of chapter 5070 of the Acts of Florida Legislature, A. D. 1901, was not included in the proviso contained in said act, which said proviso reads as follows: "*Provided*, That this act shall not be so construed as to impair the validity of any valid contract heretofore entered into between any city, town or village and any person, firm or corporation for the supply of water to such city, town or village or its inhabitants. But this act shall not be held to validate any contract heretofore made."

Tenth. The supreme court of the State of Florida erred in rendering its final decree against the Tampa Water Works Company in said cause upon the pleading therein; and that the said decree is contrary to law and the facts as stated in the pleading in said cause.

Wherefore, in order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to this court and prays that such disposition be made thereof as in accordance with law and the statutes of the United States in such case made and provided. And complainant prays a reversal of the decretal order and decree confirming the decision of the court below sustaining the demurrer to the bill of complaint and dismissing said bill of complaint.

SPARKMAN & CARTER,
P. O. KNIGHT,
Attorneys for Tampa Water Works Company.

[Endorsed:] Filed Apr. 12 1904 B. B. Wilson, clerk supreme court.

81 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Florida, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Tampa Water Works Company, appellant, and The City of Tampa, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or
82 statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of April, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

EDWARD D. WHITE,
Associate Justice of the Supreme
Court of the United States.

83 I, B. B. Wilson, clerk of the supreme court of the State of Florida, hereby certify that this writ came to hand this 27th day of April, A. D. 1904, and was duly filed by me. I also certify that a certified copy of this writ was on the same day lodged in this court for the defendant in error.

In witness whereof I have hereunto set my hand and the seal of the supreme court of the State of Florida this 27th day of April, A. D. 1904.

[Seal Supreme Court of the State of Florida.]

B. B. WILSON,
Clerk Supreme Court, State of Florida.

[Endorsed:] Filed Apr. 27 1904 B. B. Wilson, clerk supreme court.

84 UNITED STATES OF AMERICA, ss:

To the City of Tampa, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Florida wherein The Tampa Water Works Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 22d day of April, in the year of our Lord one thousand nine hundred and four.

EDWARD D. WHITE,
Associate Justice of the Supreme
Court of the United States.

85 On this 25 day of April, in the year of our Lord one thousand nine hundred and four, personally appeared before me, the subscriber, W. A. Carter and makes oath that he delivered a true copy of the within citation to John P. Wall, city attorney and attorney of record for the City of Tampa.

W. A. CARTER.

Sworn to and subscribed the 25th day of April, A. D. 1904.

[Seal of Jessie Wauchope, Notary Public, State of Florida at Large.]

JESSIE WAUCHOPE,
Notary Public for the State of Florida at Large.

I, John P. Wall, city attorney for the City of Tampa, and attorney of record for the said City of Tampa in the case of The Tampa Water Works Company *vs.* The City of Tampa, do hereby acknowledge receipt of a copy of the within citation and accept service thereof this 25th day of April, A. D. 1904.

JOHN P. WALL,
Attorney for City of Tampa.

Filed Apr. 27, 1904.

B. B. WILSON,
Clerk Supreme Court.

86 In the Supreme Court of the State of Florida, January Term, A. D. 1904.

THE TAMPA WATER WORKS COMPANY, Appellant,
vs.
THE CITY OF TAMPA, a Municipal Corporation under the Laws of the State of Florida, Appellee.

Comes now the appellant in the above entitled cause and intending to apply to the Supreme Court of the United States for a writ of error to review the decree of the court in the foregoing cause, and files this its assignment of errors upon which it will rely in the prosecution of the said writ of error in the above entitled cause:

First. The said supreme court of the State of Florida erred in its decree rendered the 20th day of February, A. D. 1904, affirming the decree rendered by the circuit court of the sixth judicial circuit of the State of Florida for Hillsborough county in chancery, in which said decree of the court below it was decreed first, that the demurrer filed by the City of Tampa to the bill of complaint of the Tampa Water Works Company be sustained; second, that the temporary injunction theretofore granted in said cause be dissolved; and third that the said bill of complaint filed by The Tampa Water Works Company *vs.* The City of Tampa, be dismissed.

Second. The supreme court of the State of Florida erred in decreeing that the demurrer filed by the City of Tampa to the bill of complaint of the Tampa Water Works Company in said cause be sustained.

87 Third. The supreme court of the State of Florida erred in decreeing that the bill of complaint of The Tampa Water Works Company *vs.* The City of Tampa, be dismissed.

Fourth. The supreme court of the State of Florida erred in holding that ordinance number 274 of the city of Tampa regulating water rates was not in violation of the fourteenth amendment of the Constitution of the United States.

Fifth. The supreme court of the State of Florida erred in holding that ordinance number 274 of the city of Tampa regulating water rates was not in violation of section ten of article I of the Constitution of the United States prohibiting States from passing laws impairing the obligation of contracts.

Sixth. The supreme court of the State of Florida erred in holding that chapter 5070 of the Acts of the Legislature of the State of Florida, A. D. 1901, granting the power to certain cities to regulate water rates was not in violation of the fourteenth amendment to the Constitution of the United States, and that it was not the taking of the property of the water works company without its consent, without compensation and without due process of law.

Seventh. The supreme court of the State of Florida erred in holding that chapter 5070 of the Acts of the Legislature of Florida, A. D. 1901, was not in violation of section ten of article I of the Constitution of the United States prohibiting States from passing laws impairing the obligation of contracts.

Eighth. The supreme court of the State of Florida erred in holding that chapter 5070 of the Acts of the Legislature of Florida, A. D. 1901, and ordinance number 274 of the city of Tampa passed in pursuance thereof were authorized by section 30 of article XVI of the constitution of the State of Florida.

88 Ninth. The supreme court of the State of Florida erred in holding that the right to regulate water rates fixed by contract between the City of Tampa and the water works company prior to the passage of chapter 5070 of the Acts of Florida Legislature, A. D. 1901, was not included in the proviso contained in said act, which said proviso reads as follows: "*Provided*, That this act shall not be so construed as to impair the validity of any valid contract heretofore entered into between any city, town or village and any person, firm or corporation for the supply of water to such city, town or village or its inhabitants. But this act shall not be held to validate any contract heretofore made."

Tenth. The supreme court of the State of Florida erred in rendering its final decree against the Tampa Water Works Company in said cause upon the pleading therein; and that the said decree is contrary to law and the facts as stated in the pleading in said cause.

Wherefore, in order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to this court and prays that such disposition be made thereof as in accordance with law and the statutes of the United States in such case made and provided. And complainant prays a reversal of the decretal order and decree confirming the decision of the court below sustaining the demurrer to the bill of complaint and dismissing said bill of complaint.

SPARKMAN & CARTER,
P. O. KNIGHT,
Attorneys for Tampa Water Works Company.

89 I, B. B. Wilson, clerk of the supreme court of the State of Florida, do hereby certify that the foregoing pages numbered from one (1) to three (3) inclusive constitute a true copy of the original assignment of errors in the case of Tampa Water Works Company, appellant, *vs.* The City of Tampa, a municipal corporation

under the laws of the State of Florida, appellee, filed in my office on the 12th day of April, 1904.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court, at Tallahassee, the capital, this 7th day of May, A. D. 1904.

[Seal Supreme Court of the State of Florida.]

B. B. WILSON,
Clerk Supreme Court, State of Florida.

90 Know all men by these presents, that we, the Tampa Water Works Company, as principal, and the United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the City of Tampa, Florida, in the full and just sum of one thousand dollars, to be paid to the said City of Tampa, its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, jointly and severally, by these presents.

Sealed with our seals and dated this 22 day of April, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a term of the supreme court of the State of Florida, in a suit depending in said court, between The Tampa Water Works Company, as complainant, and The City of Tampa, as defendant, a decree was rendered against the said Tampa Water Works Company, and the said Tampa Water Works Company having obtained writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said City of Tampa citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Tampa Water Works Company shall prosecute its writ of error to effect, and answer all costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

TAMPA WATER WORKS COMPANY, [SEAL.]
By W. A. CARTER, Att'y in Fact.

[Corporate Seal.]

THE UNITED STATES FIDELITY & GUARANTY CO.,
By J. S. SWOUNSTEDT, Attorney in Fact.

[Corporate Seal.]

Sealed and delivered in presence of—

——— ———.

Approved by—
EDWARD D. WHITE,
Associate Justice of the Supreme
Court of the United States.

91 Directors' Meeting.

TAMPA, FLORIDA, April 19, 1904.

Be it known that on this day at a meeting of the directors of the Tampa Water Works Company duly called, there were present Stuart Wood, W. A. Carter and S. M. Sparkman, constituting a majority of said directors.

The meeting being called to order the following resolution was proposed and upon a vote duly carried.

Be it resolved: That W. A. Carter be and he is hereby appointed attorney in fact for and on behalf of the Tampa Water Works Company to execute in its name any and all bonds necessary to perfect the proceedings in error in that certain cause wherein The Tampa Water Works Company is complainant and The City of Tampa is defendant that may be required by the Supreme Court of the United States, or any justice thereof; and also to execute on behalf of said company any bond which may be required in order to obtain a supersedeas pending the decision of the writ of error in said cause.

I, Chester R. McFarland, secretary of the Tampa Water Works Company, do hereby certify that the foregoing is a true copy of the minutes of said corporation as they appear on the books thereof.

Witness my hand and the seal of said company this 19th day of April, A. D. 1904.

[Corporate Seal.]

CHESTER R. McFARLAND, Secretary.

92 I, B. B. Wilson, clerk of the supreme court of the State of Florida, do hereby certify that the foregoing two pages constitute and contain a true copy of the original bond and of the minutes of the Tampa Water Works Company in the case of Tampa Water Works Company, appellant, *vs.* The City of Tampa, a municipal corporation under the laws of the State of Florida, appellee, which were filed in my office on the 27th day of April, 1904.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said supreme court, at Tallahassee, the capital, this 7th day of May, A. D. 1904.

[Seal Supreme Court of the State of Florida.]

B. B. WILSON,
Clerk Supreme Court, State of Florida.

93 STATE OF FLORIDA, }
Supreme Court. }

I, B. B. Wilson, clerk of the supreme court of the State of Florida, do hereby certify and return to the Supreme Court of the United States that the foregoing and annexed transcript of record is a full and complete transcript of the record in said court in the case of The Tampa Water Works Company, complainant, *vs.* The City of Tampa, defendant, in said supreme court, including the pleadings, exhibits, judgment, judgment roll, opinions of the supreme court in said cause, and the assignment of errors filed in said court on the 12th day of April, A. D. 1904.

And I do further certify and return that I have annexed to said transcript and included therewith the original writ of error from the Supreme Court of the United States, the original citation issued therein with proof of service thereon, and a copy of the bond on said writ of error, and that the foregoing constitutes a full, true and complete return to said writ of error.

In witness whereof, I have hereunto set my hand and the seal of said supreme court of the State of Florida, at the capitol in Tallahassee, this 7th day of May, A. D. 1904.

[Seal Supreme Court of the State of Florida.]

B. B. WILSON,
Clerk of Supreme Court of the State of Florida.

Endorsed on cover: File No. 19,360. Florida supreme court. Term No. 262. The Tampa Water Works Company, plaintiff in error, *vs.* The City of Tampa. Filed May 17th, 1904. File No. 19,360.

IN THE SUPREME COURT
OF THE
UNITED STATES,
OCTOBER TERM, A. D. 1904.

Tampa Water Works Company,
Plaintiff in Error,
vs.
City of Tampa,
Defendant in Error.

The defendant in error has filed in this cause a motion to dismiss or affirm the decision of the court below. And now comes the plaintiff in error and objects to the hearing of said motion for the reason that neither the entire record in said cause has been printed, nor have such portions of said record been printed as will enable the court to pass upon the motion without an examination of the transcript on file. This court has decided that where the record is not printed, or at least so much thereof as will enable the court to pass upon the question without reference to the transcript, it will not consider such motion.

National Bank v. Insurance Company, 10 Otto, 43.

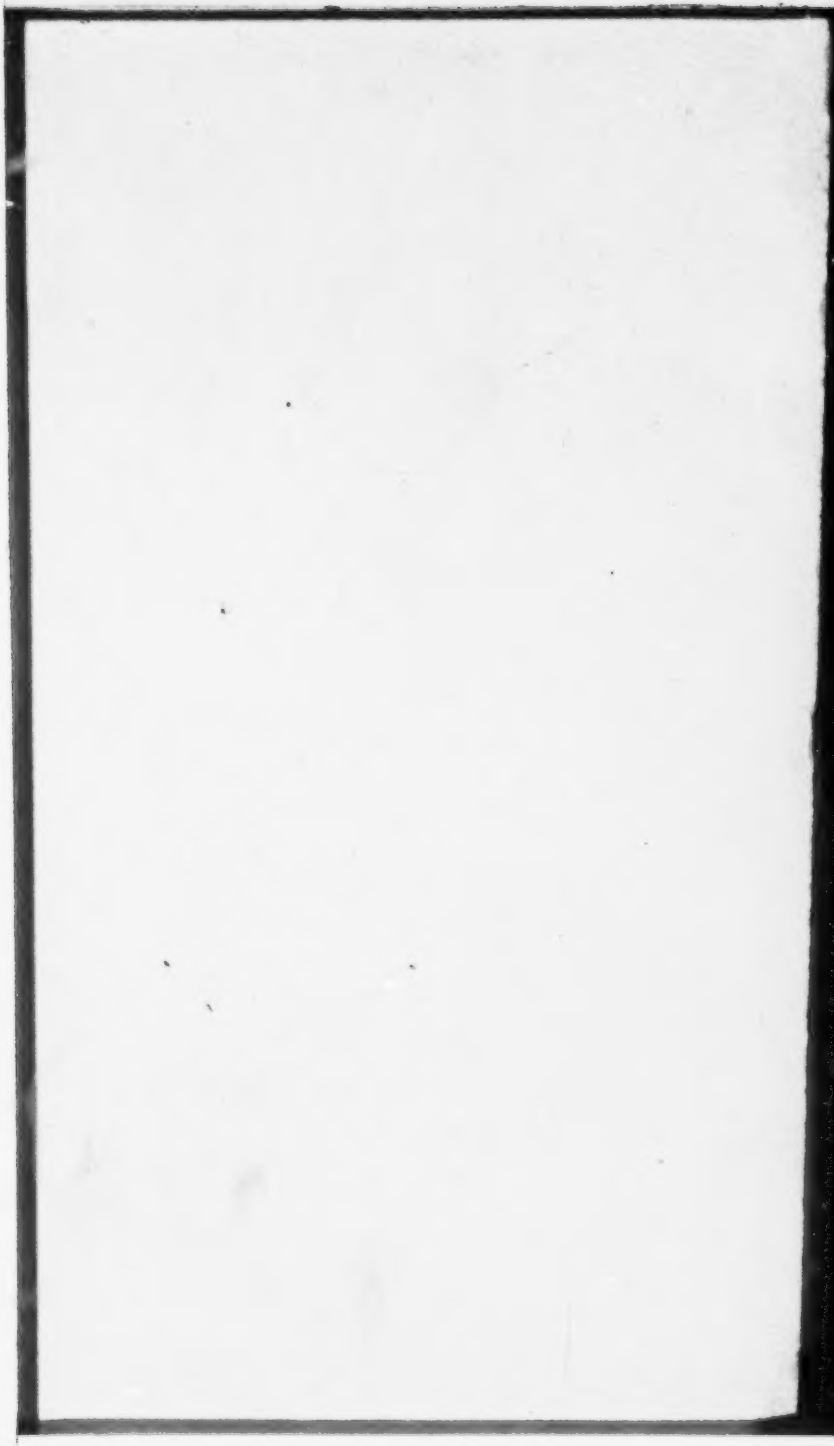
Carey v. The Houston & T. C. Ry. Company, 150 U. S., 170.

City of Waterville v. Van Slyke, 115 U. S., 290.

For the foregoing reasons we contend that the motion to dismiss or affirm should not be heard until the record has been printed, or so much thereof as is necessary for the court to understand the questions involved.

Respectfully submitted.

S. M. SPARKMAN,
P. O. KNIGHT,
Counsel for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 262.

THE TAMPA WATER WORKS COMPANY, PLAINTIFF IN ERROR,

v.

THE CITY OF TAMPA, DEFENDANT IN ERROR.

STATEMENT.

On the 29th day of September, 1887, the city council of the city of Tampa, Florida, passed ordinance number 7, embracing and ratifying a contract between the city, of the first part, and W. A. Jeter and A. E. Boardman, of the second part, giving to them, their associates, successors, and assigns, the exclusive right and privilege to construct, maintain, and operate water works for a public and private supply of water within the said city for a term of thirty years, together with the right to lay pipes, erect hydrants, fountains, and such other structures and appurtenances, in any or all of the streets or public ways in the city as might be required for the distribution of water, and to make all necessary repairs of the same.

Under this contract the said Jeter and Boardman bound themselves and their associates, successors, and assigns, among other things, to erect such a system of water works as should

supply said city with water sufficient to give it a first-class fire protection and to meet all the demands of the fire department in its practice and parades, to furnish 110 double-nozzle hydrants of the usual pattern, and to lay mains aggregating 43,963 feet in the principal streets of the said city.

For and in consideration of which, as well as the performance of other things mentioned in said contract, the city agreed to pay the water works company, as hydrant rentals, the sum of $4,950 per annum, to meet which payment it was agreed that a special tax of five mills should be levied and collected annually by the City of Tampa upon all taxable property of the city, which tax, it was agreed, should be irrepealable from and after the passage of the ordinance, and that the proceeds thereof should be kept as a separate fund and be irrevocably and exclusively devoted to the payment of the hydrant rentals and not otherwise employed; further, that in case the city should not have sufficient funds, or for any cause did not pay said money at the times fixed as aforesaid, then and in that event vouchers should be issued to the said Jeter and Boardman, their successors or assigns, which vouchers should draw interest at the rate of 7 per cent. per annum until paid; and further, that the said amount of hydrant rentals, being $4,950, might be paid by the city to the holders of the interest coupons attached to the bonds of the water works company on an amount of bonds not exceeding $82,500 at the rate of 6 per cent. interest per annum, said coupons having been made receivable for taxes up to said amount of $4,950, and when so paid it was further agreed that such payment should be a receipt and acquittance to the city for the said amount of hydrant rentals (R., pages 7 to 11).

The water works company was also given by the city council the exclusive right to the streets, and the laying of pipes through the same by others for the sale of water during the said contract was prohibited (Rec., page 9).

As a further consideration for the performance of the

duties undertaken by the said parties of the second part, it was stipulated in said contract that the owners of said water works might charge and collect for water furnished private consumers prices not to exceed certain annual rates therein fixed, which payments of water rates it was agreed, among other things, should be made quarterly and in advance (Rec., pages 10 and 11). Bills for water by meter, however, it was stipulated, must be paid monthly, but that in no case where meters were used should the annual charge be less than $25, whether the same should register water of that value or not. For all uses not therein specified, it was stipulated that the price should be within the discretion of the water works company thereafter to be organized (Rec., page 10).

The right to purchase said plant, after the expiration of ten years from completion, at the value thereof, was reserved to the city, such price and value to be agreed upon by the parties or their successors, provided that the city should give notice, one year in advance, to said parties of its intention to so purchase. In case the parties failed to agree as to price to be paid, it was stipulated that the same was to be determined by arbitration.

Provision was also made by said contract for the extension of the pipes and mains and the erection of additional hydrants as the city should order or there should otherwise become a necessity for such extension and additional hydrants, the city agreeing to pay for the same at the rate of $45 per annum for each additional hydrant, until the said hydrants should reach 200, when the rental for the whole was to be reduced to $40 per annum.

Section 10 of the said contract provides as follows:

"If default be made in any of the conditions specified in this ordinance by the said Jeter and Boardman, their associates, successors, or assigns, then the ordinance shall become null and void, otherwise it shall remain and be in full force from the date of its passage."

Section 12, among other things, contains the following:

"That the City of Tampa hereby approves, ratifies, and confirms the foregoing contract made and entered into with the said Jeter and Boardman, and their associates, by the mayor and president of the city council of the said city of Tampa, Florida."

Work of construction was begun and completed within the time agreed upon and the works accepted by the City of Tampa, but before the completion thereof The Tampa Water Works Company, plaintiff in error, was duly incorporated under the general incorporation laws, chapter 1639 of the laws of the State of Florida, approved August 8, 1868, and to which corporation the said Jeter and Boardman assigned said contract, with all the rights, franchises, and privileges granted to them and their successors, associates, and assigns, as aforesaid.

At the time that this contract was entered into there were in force in the State of Florida chapter 3779 of the Session Laws approved June 2, 1887, under which the City of Tampa was incorporated, entitled "An act to abolish the corporations of the towns of Tampa and North Tampa, to provide a municipal government for the city of Tampa, and to define the boundaries thereof;" chapter 37 of McClellan's Digest of the Laws of Florida, said chapter being the general laws for the incorporation of cities and towns, and chapter 1639 of the laws of Florida, above mentioned, entitled "An act to provide for the creation of corporations and to prescribe their general powers and liabilities."

Chapter 3779, in section 3, enacted that—

"The government of the said city shall be vested in a mayor and eleven councilmen, to be called the city council of Tampa, who shall be legal voters of the said city, two of whom shall be elected from each ward of the said city and the remaining three from the city at large."

Section 7 provided, among other things, as follows:

"That the city council shall have power to make, ordain, establish and execute for the government of the said city such ordinances in writing and such by-laws for the government of the said city council and its officers, not inconsistent with the constitution or laws of this State or of the United States; *Provided*, A majority of the said city council assent thereto, as they shall deem necessary, * * * *to provide for the establishment of water works*, electric or other lights for the streets; to keep open and in repair, streets, alleys, commons, parks, groves and grounds, and to close the same when necessary; to prescribe and maintain a system of drains and sewerage, to organize and provide a fire department, and to regulate the same, so as to protect the city from fire * * * and to do and regulate any other matter or thing that may tend to promote the peace, welfare, health, prosperity and morals of the said city. * * * And in addition to the powers hereinbefore enumerated the said city council shall have all the powers and perform all the duties imposed upon them by the laws of Florida, now in force, or which may hereafter be enacted, providing for the creation of cities and towns. And the mayor, marshal, clerk, treasurer, tax assessor, and tax collector shall have all the powers and perform all the duties conferred and imposed upon them by the statutes in such case made and provided."

Section 12 provided, among other things—

"That all the laws now in force or that may hereafter be enacted, for the government of cities and towns, except in so far as they may conflict with the provisions of this charter, shall apply to the said municipality and the officers thereof," * * *

Chapter 37 of McClellan's Digest of the Laws of Florida, then in force, after designating in previous sections the manner in which cities, towns, and villages might become incorporated, provided in section 8 thereof as follows:

"The provisions of the previous sections having been complied with, the persons therein named, or their successors, shall thereupon constitute and become a body corporate, with

the power and authority to take and hold property, real, personal and mixed, and control and dispose of the same for the benefit and best interest of the corporation aforesaid, to sue and be sued, plead and be impleaded, and to do all other such acts and things as are incident to corporate bodies."

Section 17 of said chapter provided, among other things, that—

"The city or town council shall have power * * * to construct drains and sewers," * * *

And section 21—

"That the city or town council shall have power * * * to pass all necessary laws to guard against fires."

Chapter 1639, in section 2, provided, among other things, that—

"Every corporation as such shall have power: First, to have succession by its corporate name for the period limited in its articles of incorporation, and when no period is limited, for twenty years. Second, to sue and be sued, complain, defend, plead and be impleaded in any court of law or equity. Third, to contract and be contracted with, and make and use a common seal, and alter the same at pleasure. Fourth, to hold, buy, mortgage or otherwise convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its articles of incorporation; also to take, hold and convey such other property, real, personal or mixed, as shall be necessary or requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability belonging to the corporation." * * *

Section 38 provides that—

"Any corporation organized and put into successful operation under this act shall have exclusive privileges for the purpose of its creation for the term of twenty years from the date the corporation commences to carry out in good faith the articles of incorporation; *Provided, however*, That this investment shall not so operate as to divest any future legis-

lature of those powers of government which are inherent and essential attributes of sovereignty, to wit, the power to create revenue for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience, and to take private property for public use and the like."

On the 6th day of June, 1889, the City of Tampa passed ordinance No. 42, amending said ordinance No. 7, in which it was provided, among other things, that—

"The mains should be extended and additional hydrants erected as specified therein. Said ordinance also approved ratified and confirmed said contract, including all amendments, and further, permitted the increase of said bond issue by said Water Works Company" (Rec., pages 14 and 15).

Again, on the 6th day of February, 1890, ordinance No. 51 was passed and approved, in which the clause in the contract, as set forth in said ordinance, authorizing the city to purchase said water works, was more particularly defined and explained (Rec., pages 15 and 16).

It also contained a similar provision to that contained in the original contract regarding the use of hydrant rentals in the payment of interest due upon the bonds of said company.

On the 13th of June, 1902, the Revised Statutes of Florida went into effect, sections 725, 726, and 727 being as follows:

Section 725:

"*Certain Organizations Declared Legal.* * * * All incorporated cities and towns which, prior to February 4, A. D. 1869, reorganized under the provisions of an 'Act to provide for the incorporation of cities and towns, and to establish a uniform system of government in the State,' approved August 6, A. D. 1868, and have since been exercising the privileges and powers granted by said act, and an act entitled 'A bill to be entitled an act to provide for the incorporation of cities and towns, and to establish a uniform system of government in this State," approved February 4, 1869, or any law

passed subsequent to said last-named act be and the same are made and declared to be legal municipal corporations and governments, the same as if legally organized under the said law, approved February 4, A. D. 1869."

"SECTION 726. *Other Municipalities Declared Legally Incorporated.* * * * All the cities and towns which now are and for ten years past have been exercising municipal government are hereby declared legally incorporated."

"SECTION 727. *Acts Made Valid.*—All the acts and doings of cities and towns included in either of the last two foregoing sections, and of the governments and officers of the same, done under any law of the State of Florida, are declared valid; and said municipal corporation and governments, and all officers of the same, shall have all the powers and privileges granted by said law, approved February 4, A. D. 1869, and all subsequent laws relating to municipal corporation, and the government of the same."

The city charter was amended in 1893, again in 1895, and was fully revised by chapter 4883, passed in 1899. The powers, however, of the city council in the matter of establishing water works were not changed, except that the clause in section 7 (section 17 in the amended charter) which contained the general grant of powers was changed so as to read, "to do and regulate any other matter or thing that may tend to promote the peace, health, welfare, prosperity, and morals of the city, *and to carry into effect the aforesaid powers.*"

Section 48, however, provided that—

"Nothing in this act shall invalidate or make void any act done by the city council or any of the officers of the said city, or the commissioners of public works or any contract entered into by them or any of them, or any suit pending, begun prior to the passage of this act, or any ordinance or ordinances not in conflict with this act, but the same shall remain in full force and effect."

Chapter 4881—passed at the same session and approved May 29, 1899, being an act to "legalize the assessment and levies of taxes for the years 1888, 1889, 1890, 1891, 1892,

1893, 1894, 1895, 1896, 1897, and 1898 by the city of Tampa, and to legalize the tax certificates and list of certified lands held by the City of Tampa for taxes assessed in 1888, 1889, 1891, 1892, 1893, 1894, 1895, 1896, and 1897, and to prescribe the mode of collecting the same"—provided in section 1:

"That the assessment and levy of taxes as made and entered upon the assessment-rolls of the City of Tampa, for the years of 1888, 1889, 1891, 1892, 1893, 1894, 1895, 1896, 1897, and 1898 are severally and hereby legalized and confirmed and the sales of the said city taxes for the years of 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896 and 1897, and the certificates issued upon said sales and not redeemed severally are hereby legalized and confirmed and the City of Tampa, as the holder of said certificates issued upon the sale of taxes for the years of 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896 and 1897, shall have a superior lien to all others except State and county taxes, upon the property described in the said certificates, which lien shall be enforced as other liens, either by suits in court of law or in equity. The cost of all such proceedings for the enforcement of all said liens under the tax-sale certificates, including an attorney's or solicitor's fee of five ($5.00) dollars and ten per cent. of the amount collected, which shall be paid to the attorney or solicitor representing the complainant in said suits, as his compensation shall be recovered and collected by such suits. That the certified list of taxes for the year of 1892 as made by the City of Tampa, being unpaid and delinquent, shall be and remain a lien upon the property so certified, and that lien shall be enforced against said property as herein provided for the enforcement of a lien, tax-sale certificate, and with the same force and effect."

On the 4th day of October, 1899, the city council passed a resolution, approved on the same day, which, after reciting that there was in existence and in force a valid contract between the City of Tampa and the Tampa Water Works Company (which was therein again approved and ratified), further recited that there was certain litigation pending between the City of Tampa and the Tampa Water Works Company over the construction of said contract, and that it was to the

mutual interest of both parties that the said litigation should be terminated, agreed, among other things:

"That for and in consideration of the covenants thereinafter mentioned to be performed by the City of Tampa, the said water works company would reduce the water rates as therein specified."

Then followed a list of the said rates as thus reduced (Exhibit "III," Rec., pages 16 to 19, inclusive).

The City of Tampa further agreed as follows:

"That it will carry out and perform all the covenants herein agreed on its part in reference to all matters, and particularly as to the accepting and paying for additional hydrants herein provided for at the rental herein specified."

And further:

"In consideration of the covenants herein mentioned, it is agreed that the City of Tampa shall not during the life of this contract enter into competition with the said party of the second part, in supplying and furnishing water to said city or its inhabitants."

It will be seen that not only were the spigot and other rates actually fixed, but a minimum meter rate provided in some instances. Provision for the extension of pipes and mains and the increase in the number of hydrants was made. The city on its part agreed, among other things, to dismiss all suits pending between it and the Tampa Water Works Company, to pass an ordinance for the protection of the water supply, to furnish promptly grades of streets on which extensions were desired.

On the 9th of October, 1899, the city attorney, acting under and in pursuance of this agreement, filed a præcipe for the dismissal of said suit mentioned in this agreement, whereupon the clerk entered an order dismissing the same, as he was authorized to do under the law (Rec., page 23).

Afterwards, on the 31st day of May, 1901, chapter 5070 of

the Session Laws of Florida was passed by the legislature and approved by the governor, which act is as follows:

"That the corporate authorities of any city, town or village, now or hereafter incorporated under any general or special law of this State, in which any individual, company or corporation has been, or may hereafter be authorized by such city, town or village to supply water to such city, town or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance rates and charges for the supply of water furnished by such individual, company or corporation to such city, town or village and the inhabitants thereof, such charges to be just and reasonable. Provided, that this act shall not be so construed as to impair the validity of any valid contract heretofore entered into between any city, town or village and any person, firm or corporation for the supply of water to such city, town or village or its inhabitants. But this act shall not be held to validate any contract heretofore made."

On December 20, 1901, the city council of Tampa passed ordinance number 274, which provided in section I—

"That from and after the first day of January, 1902, it shall be unlawful for any individual, company or corporation furnishing water to the city of Tampa or its inhabitants, to charge or collect any higher rates for water than those hereinafter specified."

Then in section 2 followed the rates, by which it will be seen that this ordinance reduced the prices which the water works company was permitted to charge under the resolution marked Exhibit "III" at least one-half, while the rates for water to the city were lowered from $35 per hydrant to $22.50, water through meters and flush tanks from 9 cents to 7 cents per hundred cubic feet, while the minimum monthly water rate provided in the original contract was taken away entirely.

Section 3 provided a penalty for violation of said ordinance by any party or parties so furnishing water of a fine of $200 or imprisonment for not more than sixty days, or by both

such fine and imprisonment; also undertook to repeal all ordinances or parts of ordinances in conflict with the provisions of the same (pages 4 and 5, Rec.).

Plaintiff in error deeming its right invaded by this ordinance, on the 26th day of December, 1901, filed its bill on the chancery side of the circuit court for Hillsborough county, State of Florida, against the defendant in error, setting forth said contract between Jeter and Boardman and the City of Tampa, the organization of the Tampa Water Works Company, the assignment of the contract between Jeter and Boardman and the city to the corporation so organized, the completion of the works by the plaintiff in error, and the acceptance of the same by the defendant in error; also the various ordinances and acts by the city council of the city of Tampa confirming and accepting said contract as legal and binding. Plaintiff in error also made a part of this bill and as exhibits thereto said ordinances 7, 42, 51, as also the resolution passed and approved October 4, 1899, marking them respectively as Exhibits "A," "I," "II," "III."

Said bill further alleged the binding character of said contract; that the water works company had performed all the covenants and agreements which it had undertaken on its part to perform with said city, and that it was at the time of the filing of said bill performing and carrying out in good faith all the covenants on its part to be performed; that the service of the company in the matter of furnishing water had been during all of said time up to the filing of said bill accepted by the City of Tampa; that the rates for furnishing water to said city and to the inhabitants thereof had been fixed and agreed upon for the period of thirty years and incorporated in said contract and were the sole consideration moving the company in the undertaking to carry out said contract, and that up to the time of the making of said contract of October 4, 1899, the company had charged and collected of the City of Tampa and the inhabitants thereof

the rates specified in said original contract; that at the time said contract was entered into the city of Tampa was a small village, and that among other inducements to invest the money of the said company in said town was that the rates so fixed in said contract should be charged during the entire life of said contract, plaintiff in error hoping and expecting that the city of Tampa would so grow as that it would be able to make a reasonable interest on its investment; that the city did so grow, and that owing to its growth the company had in 1899 decided that it could reasonably make the reductions in rates provided for in Exhibit "III," and that the same were made for and in consideration of the covenants and agreements mentioned in said ordinance; that on the 20th of December, 1901, the City of Tampa, disregarding its obligations to the plaintiff in error, and in contravention of the laws and constitution of the State of Florida, and particularly in violation of that section of the Constitution of the United States which provides that no State shall pass any law impairing the obligation of a contract, also in violation of the fourteenth amendment to the Constitution of the United States, passed ordinance No. 274, which fixed and reduced the rates to be charged to the city and to the inhabitants thereof much below that agreed upon.

Said bill further alleged that the city did not have the power to pass said ordinance, that the same violated the contract rights of the complainant, impaired the obligation of the contract theretofore entered into between the City of Tampa and the complainant, and amounted to the taking of its property without due process of law. The bill prayed that the City of Tampa, its agents and officers, might be enjoined, during the pendency of the suit, from enforcing said ordinance No. 274, that upon a final hearing the same might be declared null and void, and that a perpetual injunction issue against the city, its officers and agents (Rec., pages 1 to 14, inclusive).

A temporary injunction was issued on December 26, 1901,

and on the 29th of December, 1902, complainant filed an amended bill, setting up, among other things, section 30 of chapter 1639 of the laws of Florida heretofore referred to, and alleging that the said corporation had been put into successful operation under the same (Rec., pages 20 to 23, inclusive).

Said amended bill further claimed that the right of the city to contract for a period of thirty years, the right of the city council to change the rates to be charged the consumers as fixed in said contract by the city without the consent of the water works company, including the question as to the legality of said contract in all of its details, had been determined and settled in favor of the complainant in and by a certain suit referred to in said amended bill and the decree rendered therein, and that said decree and proceedings still remained undetermined and in full force, and that the same were *res adjudicata* (Rec., pages 20, 21).

To this bill and amended complaint defendant below, on December 22, 1902, interposed a demurrer, at the same time filing a motion to dissolve said temporary injunction These coming on to be heard on the 29th day of December, 1902, were overruled, and said temporary injunction made perpetual (Rec., page 26).

From this decree the City of Tampa appealed the said cause to the supreme court of the State of Florida, which appeal, coming on to be heard before the supreme court on the 20th day of April, 1903, said court rendered a decree reversing the decision of the lower court in every particular, remanded said cause with directions to sustain the demurrer to the bill, and for such further proceedings as might be agreeable to equity practice and consistent with the opinion of the court rendered therein. Afterwards and on the 15th day of June, 1903, the said cause again coming on to be heard before the circuit court, said court rendered a decree dissolving the perpetual and temporary injunction, sustaining the demurrer to said bill, and finally dismissing the same (Rec., page 29).

From this decree the Tampa Water Works Company appealed said cause to the supreme court of the State of Florida, which court on the 20th day of February, 1904, rendered its judgment therein, affirming the decree of the court below, and awarding costs against the Tampa Water Works Company (Rec., page 32).

The water works company, feeling itself aggrieved by this decree, has brought said cause to this court by writ of error, assigning as errors the following:

ASSIGNMENT OF ERRORS.

First. The said the supreme court of the State of Florida erred in its decree rendered on the 20th day of February, A. D. 1904, affirming the decree rendered by the circuit court of the sixth judicial circuit of the State of Florida, for Hillsborough county, in chancery, in which said decree of the court below it was decreed: First, that the demurrer filed by the City of Tampa to the bill of complaint of the Tampa Water Works Company be sustained; second, that the temporary injunction theretofore granted in said cause be dissolved; and, third, that the said bill of complaint filed by The Tampa Water Works Company *vs.* The City of Tampa be dismissed.

Second. The supreme court of the State of Florida erred in decreeing that the demurrer filed by the City of Tampa to the bill of complaint of the Tampa Water Works Company in said cause be sustained.

Third. The supreme court of the State of Florida erred in decreeing that the bill of complaint of the Tampa Water Works Company *vs.* The City of Tampa be dismissed.

Fourth. The supreme court of the State of Florida erred in holding that ordinance No. 274 of the City of Tampa regu-

lating water rates was not in violation of the fourteenth amendment of the Constitution of the United States.

Fifth. The supreme court of the State of Florida erred in holding that ordinance No. 274 of the city of Tampa regulating water rates was not in violation of section 10 of article I of the Constitution of the United States, prohibiting States from passing laws impairing the obligation of contracts.

Sixth. The supreme court of the State of Florida erred in holding that chapter 5070 of the Acts of the Legislature of the State of Florida, A. D. 1901, granting the power to certain cities to regulate water rates, was not in violation of the fourteenth amendment to the Constitution of the United States, and that it was not the taking of the property of the water works company without its consent, without compensation, and without due process of law.

Seventh. The supreme court of the State of Florida erred in holding that chapter 5070 of the Acts of the Legislature of Florida, A. D. 1901, was not in violation of section 10 of article I of the Constitution of the United States prohibiting States from passing laws impairing the obligation of contracts.

Eighth. The supreme court of the State of Florida erred in holding that chapter 5070 of the Acts of the Legislature of Florida, A. D. 1901, and ordinance No. 274 of the city of Tampa, passed in pursuance thereof, were authorized by section 30 of article XVI of the constitution of the State of Florida.

Ninth. The supreme court of the State of Florida erred in holding that the right to regulate water rates fixed by con-

tract between the City of Tampa and the water works company prior to the passage of chapter 5070 of the Acts of the Florida Legislature, A. D. 1901, was not included in the proviso contained in said act, which said proviso reads as follows:

"*Provided:* That this act shall not be so construed as to impair the vitality of any valid contract heretofore entered into between any city, town or village, and any person, firm or corporation for the supply of water to such city, town or village or its inhabitants. But this act shall not be held to validate any contract heretofore made."

Tenth. The supreme court of the State of Florida erred in rendering its final decree against the Tampa Water Works Company in said cause upon the pleading therein, and that the said decree is contrary to law and the facts as stated in the pleading in said cause.

Wherefore, in order that the foregoing assignment of error may be and appear of record, the complainant presents the same to this court and prays that such disposition be made thereof as in accordance with law and the statutes of the United States in such case made and provided; and complainant prays a reversal of the decretal order and decree confirming the decision of the court below sustaining the demurrer to the bill of complaint and dismissing said bill of complaint.

ARGUMENT.

It will be seen that the errors assigned, read in the light of the record, cover three propositions which, succinctly stated, are—that ordinance 274 of The City of Tampa, defendant in error, and the act upon which it is predicated impair the obligation of the contract embraced in ordinance 7, as amended by ordinance 42, 51, and the resolution passed and approved October 4, 1899, contained in Exhibit "III" to the bill of plaintiff in error, deprives it of its property without due process of law, and denies to it the equal protection of the laws.

The main question for consideration, of course, is whether the city has the power to pass and enforce ordinance No. 274. The answer to this depends upon the right of the city to contract with the water works company as it undertook to do in ordinance No. 7, and those amendatory thereof or supplemental thereto, for a public and private supply of water at fixed rates for a given time, and so to bind any future council from altering or in any wise interfering with the same, whether it so contracted and whether such contract at the time of the institution of the suit in the State court was a legal and binding contract. In response to the questions thus suggested the plaintiff in error submits these propositions:

First. That the City of Tampa had the power when ordinance No. 7 was passed and the amendments thereto were adopted, to contract with the Tampa Water Works Company for a supply of water.

Second. That it also had the power, by such contract, to fix the rates for services to be rendered by the company during the entire life of the contract and thus to bind itself not to interfere with the rates during the contract period.

Third. That it actually did so contract.

Fourth. That said contract has been ratified by subsequent legislation.

Fifth. That all the questions involved in this suit were adjudicated in favor of the plaintiff in error before the institution of said suit in the Florida State court, and that all of said questions are hence *res judicata.*

Sixth. That the enforcement of said ordinance No. 274 without the consent of plaintiff in error, by reducing the rates as fixed in ordinance No. 7, and those amendatory thereof, and by otherwise changing said contract between the city and the water works company, would impair the obligation thereof, deprive the plaintiff in error of its property without just compensation, and also deny to it the equal protection of the laws.

I.

The City of Tampa at the time said contract was entered into and the amendments thereto made possessed ample power to contract with the plaintiff in error for a public and private supply of water.

It had the power given to it by its charter and other legislation which formed a part thereof to provide for the establishment of water works.

It has often been held that the power to establish water works and other public utilities carries with it the power to

contract with others to perform such services or to furnish such utilities.

Los Angeles Water Works Company *v.* City of Los Angeles, 88 Fed. Rep., 720–729.

Santa Anna Water Works Company *v.* The Town of Buenaventura *et al.*, 56 Fed. Rep., 339.

Wells *v.* Atlanta, 43 Ga., 67.

Atlantic City Water Works Company *v.* Atlantic City, 48 N. J. Law, 278.

Indianapolis Gas Light Company *v.* The City of Indianapolis, 66 Fed. Rep., 396.

1 Dill, sec. 91, 443.

Authorities might still further be multiplied, but these will suffice, especially as we shall perhaps refer again to the same cases in the discussion of another question.

But in addition to the authority granted in the language of the city charter thus quoted, there was other legislation in force at the time ordinance No. 7 was passed bearing upon the same subject-matter. In section 7 of chapter 3779 of the city charter the city council was further given authority to exercise all the powers and perform all the duties imposed upon it by the laws of Florida then in force, or that might thereafter be enacted, providing for the creation and the government of cities and towns.

Among the laws in force at the time were the general incorporation laws for the incorporation of cities and towns (being chapter 37, McClellan's Digest of the Laws of Florida), section 7 of which gave the city council power to construct drains and sewers, and to pass all necessary laws to guard against fire, while section 8 provided that cities and towns organized under this chapter should have full power and authority to "take and hold property—real, personal, and mixed; to control and dispose of the same for the benefit and best interests of the corporation; to sue and be sued, plead and be impleaded, *and to do all such acts and things as are incident*

to corporate bodies." This is a very extensive grant of powers. What then are the powers incident to corporate bodies?

Morawetz on Corporations, section 325, says:

"That powers possessed by corporations are, among other things, to sue and be sued, implead and be impleaded, to grant and receive, by its corporate name, and perform other acts as natural persons may."

While in section 336 he says:

"A corporation has ample authority to act in the same manner as a copartnership in carrying on its legitimate business; and, therefore, it may enter into any contract which is reasonably adapted to further the enterprise for which it was chartered, unless it be restrained by the charter or general law."

Now, the power to take and hold property and dispose of the same certainly carries with it the power to contract, as property cannot be acquired or disposed of in any other way; but when municipalities are, in addition, given the same powers that other corporations have, we can conceive of nothing by way of contract and pertaining to the objects and purposes of their creation that they may not do. It would, therefore, seem that nothing was wanting at the time of the passage of ordinance No. 7, in the matter of legislative authority, to give the city power to contract for a supply of water.

But the powers with which the water company was clothed were equally as extensive.

Among the powers given to such corporations were those to contract and be contracted with, to make and use a common seal and alter the same at pleasure, to hold, buy, mortgage, or otherwise convey such property, whether real, personal, or mixed, as might be necessary or requisite for such corporation.

We have seen what the power to contract and be contracted

with embraces—that it implies everything necessary to carry out the objects and purposes of a corporation, so that, acting within the scope of its corporate necessities, there were no bounds set to the plaintiff in error in those directions. It was organized for the purpose of erecting water works and supplying the city of Tampa and its inhabitants with water, and hence had full power to contract with the city to that end, as the city had to agree with the water works company for such purpose.

So we conclude that there was no limitation whatever upon the power of either of the contracting parties to enter into a contract for the erection of water works and for a public and private supply of water.

II.

The City of Tampa likewise had the power in such contract to fix the rates for a public and private supply of water for said city and its inhabitants during the entire contract period, and so to bind any future council from altering or interfering in any way with the same.

a. This conclusion seems inevitable to us, both upon reason and authority.

The unqualified right, either express or implied, to contract for a supply of water for a given period of time would naturally carry with it the power to fix the rates during the same period of time. What use would be the authorization to contract for a supply of water unless accompanied by the further power to fix the compensation which the party whose services may be sought to furnish the same should receive therefor? No one would undertake to make the requisite investment to perform the services through a long

term of years unless the rates were fixed beyond the control of the legislature or the municipality. The power is not only convenient but necessary.

Of course the question naturally arises, was the power given in this case an unqualified and unrestricted power? The city claims it was not, but we will come to that question a little later, while at present we content ourselves with the statement that it is competent for a State legislature, unless prohibited by some constitutional provision, to authorize a municipal corporation to contract with a private individual or corporation for the performance of such services as the furnishing of a public and private supply of water, and so to preclude itself and any future common council during the specified period from altering or in anywise interfering with such contract.

Such is the great weight of authority.

McQuillin Mun. Ord., sec. 584.

Detroit *v.* Detroit Citizens' St. Ry. Co. (22 Sup. Ct. Rep., 410).

New Orleans Gas-Light Co. *v.* La. Light & H. P. Mfg. Co. (115 U. S., 650).

New Orleans Water Works Co. *v.* Rivers (115 U. S., 683).

St. Tammany Water Works Co. *v.* New Orleans Water Works Co. (120 U. S., 64).

Los Angeles *v.* Los Angeles City Water Co. (88 Fed. Rep., ——; 177 U. S., 558).

Walla Walla *v.* Walla Walla Water Co. (172 U. S., 1, 9).

Pingree *v.* Michigan C. R. Co. (118 Mich., 314).

Atlantic City Water Works *v.* City of Atlantic (48 N. J. Law, 378).

Ill. Trust and Savings Bank *v.* City of Arkansas City (76 Fed. Rep., 271).

City of Greenville *v.* Greenville Water Works (27 So. Rep., 764).

City of Vincennes *v.* Citizens' Gas Light Co. (132 Ind., 114).

City of Indianapolis *v.* Indianapolis Gas, Light and Coke Co. (66 Ind., 396).

City of Newport *v.* Newport Light Co. (84 Ky., 168).

Fergus Falls Water Co. *v.* City of Fergus Falls (65 Fed. Rep., 591).

In Atlantic City Water Works *v.* City of Atlantic (48 N. J. Law, 378) the charter provided that "the common council of this city shall have authority to provide by ordinance for a supply of water for said city." Under this authority an ordinance was passed providing for the payment of rates so long as the company should comply with its terms. No time for the duration of the contract or the price was fixed by statute. The ordinance, however, as in this case, provided for the payment of a specified sum semi-annually as rent for water for fire protection. The cause came up on demurrer to the complaint and the court held that the contract continued so long as plaintiff company should comply with its obligations, and that the said contract was not *ultra vires*.

In the case of The City of Greenville *v.* Greenville Water Works (27 So. Rep., 764) a municipality was authorized to enact such laws, not contrary to the constitution, as they deemed necessary for the good order and health of the city. The court held that it had power to contract for a water supply, and further that it had the power to bind the city on that account for a reasonable time, if not for the whole period named in the ordinance, and sustained the contract which was made to cover a period of twenty-five years.

In City of Vincennes *v.* Citizens' Gas Light Co. (132 Ind., 114), the court says:

"The making of contracts for the supply of water for a considerable time, at fixed prices, is ordinarily necessary and permissible."

Crowder *v.* Town of Sullivan, 128 Ind., 486; Citizens *v.* Town of Elwood, 114 Ind., 332, are to the same effect.

In City of Newport *v.* Newport Light Co., 84 Ky., 168, where the City of Newport was authorized to construct, maintain, and operate gas works and pass all ordinances necessary to regulate the same, the court say:

"It is purely a question of contract. If the City of Newport had the right to contract with the appellee to furnish gas to the city and to such of its inhabitants as might desire to use it, the contract should be enforced, and neither the city nor any individual or corporation can interfere with its rights. * * *

"The city has exhausted its power and done that which under legislative authority it had the right to do. * * *

"We interpret this class of contracts and the legislation under which they are made, as in all other cases of contracts, in the light of reason, and with a view of carrying into effect the legislative intent. The exercise of the franchise was necessary to accomplish the object in view, and it was indispensable to enable the appellee to comply with its terms, and no individual or corporation would have invested such a large sum of money as is conceded was necessary, with the privilege on the part of the council to abandon its terms in part.

* * * * * *

"The contract with the corporation is as inviolable, and the right to contract exists as with natural persons, and the city council of Newport, looking to the comfort and convenience of its population and the public welfare, has contracted with appellee to furnish gas for a fixed period. There is no pretense that any of its provisions have been violated by appellee, or that it has any of the elements of fraud or mistake fatal to any contract, and, therefore, the law should recognize its validity and enforce its obligation."

In making the claim as to the inviolability of the contract, even in the light of the authorities cited, we are not unmindful of such cases as those of Freeport Water Co. *v.* City of Freeport, 21 Sup. Ct. Rep., 493; Rogers Park Water Co. *v.* Furgus, *ibid.*, 490; Knoxville Water Co. *v.* Knoxville,

23 Sup. Ct. Rep., 531, and Spring Valley Water Works Co. *v.* Schottler, 110 U. S., 347; from all of which the case at bar can be easily differentiated. In each of these cases the right had been reserved by the legislature to regulate rates either by the State or by the municipality. Here there was no such right reserved, as we will undertake to show presently.

With full power to provide for a water supply, with no reservation in any statute permitting the legislature or the city to regulate, the defendant in error by an ordinance fixed the rates for the whole period of thirty years. Under these circumstances none of the cases last above cited will apply.

The case at bar is not unlike that of The City of Detroit *v.* Detroit Citizens' Railway Co., *supra*, in so far as authority to contract and fix rates was concerned. In that case the legislature had declared that railway rates for street railroads could be fixed by agreement between companies and corporate authorities, such rates not to exceed five cents. This court held that the rate could not be reduced below the maximum without the consent of the company, even under the right given the city to prescribe from time to time rules and regulations for the running and operation of the road, and a State constitution reserving the right to amend, alter, or repeal all laws passed for the incorporation of private companies.

Here, it is true, the city is not authorized *in totidem verbis* to fix rates by agreement with the water company, but certainly the authority is none the less given. We have seen that the power to establish water works carries with it the power to contract in respect to rates, and the power is as clearly implied in the case at bar as it is positively expressed in the one last above cited. Hence, the same conclusion as to the sacredness of the contract is reached in the one as in the other.

In the case of Detroit *v.* Detroit Citizens' Street R. Co. stress was apparently laid on the fact that the contract language as to rates was that of the city. Reference was likewise made to this feature of the Detroit case in that of Knoxville Water Company *v.* Knoxville, *supra*. Now the same feature is prominent in the case at bar. The original contract is embraced in section 2 of ordinance No. 7, thus becoming a part of the contract, while section 6 approves the rates, and section 12 ratifies the contract as a whole.

This is likewise true of the amendatory contract of October 4, 1899, embraced in Exhibit III to the bill of complaint of plaintiff in error in the court below and which took the shape of a resolution passed by the city council. The first paragraph of the preamble to this resolution recognizes the contract in this language:

"Whereas, there is in existence and force a valid contract between the City of Tampa and the Tampa Water Works Company, which said contract is hereby recognized by both the City of Tampa and the Tampa Water Works Company as binding upon the parties;"

So it will be seen that the city has confirmed and ratified said rates, as well as the entire contract, in several instances, thus becoming the leading character in the contract, in so far as it is possible for one of the contracting parties in an agreement to take a leading part. Having the power to contract, it did so in language unmistakable and entirely its own.

b. But the city claims that the power of the city to contract, if given at all, was limited by section 30, article XVI, of the constitution, which is as follows:

"The legislature is vested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property,

or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures."

And, further, that under and by virtue of this, as also chapter 5070 of the Laws of Florida approved May 31, 1901, the city council had the right to change and reduce the rates as fixed by contract between the city and the water works company without the consent of the latter, and to that end to pass and enforce ordinance No. 274. Indeed, it was upon that theory of the case that the supreme court of Florida decided adversely to plaintiff (City of Tampa *v.* Tampa Water Works Co., 34 So. Rep., 631; also Record, pages 42 to 50, inclusive).

We contend, however, that this provision conferred no power upon the legislature. This is manifest upon the face of the provision. It is only declaratory of a power that already existed. The supreme court of that State so held in State *ex rel.* Lamar *v.* Jacksonville Terminal Co., 41 Fla., 377; 27 So. Rep., 225. It was there said with reference to this provision that "it does not purport to confer a power or to point out the manner in which a power shall be exercised. The section was inserted in response to a popular demand for some provision upon the subject. It does not grant the legislature a power. It expressly recognizes a power and declares that it does exist. The provision is a specific declaration that the power exists in the legislature, to be exercised at any time, and because of its importance, and possibly to guard against the misinterpretations of other provisions to impair or deny the power, it was specifically mentioned and declared in the constitution."

The legislature had that power before the adoption of the constitution of 1885. In fact, it is a power inherent in every American State legislature, and does not require to be expressed in order that the legislature may pass laws for the

correction of abuses or to prevent excessive charges by persons or corporations performing services of a public nature where contract rights do not intervene.

Railroad Commissioners *v.* P. & A. R. R. Co., 24 Fla., 417; Munn *et al. v.* People of Illinois, 4th Otto, 113; C. B. Q. R. R. Co. *v.* Cutts, 4th Otto, 155; 24 L. C. P. Co., 94.

Cooley Const. Lim., 7 ed., 870.

In the case of Railroad Commissioners *v.* P. & A. R. R. Co., *supra*, 471, Justice Raney, in discussing the right of the legislature to confer the rate-making power upon railroad commissioners, said:

"It may be remarked *in limine* that the power of the legislature to regulate and fix the charging rates of railroad companies chartered by the State, where the charter itself in a contractual view does not surrender the right to exercise the power, is not disputed; but that it is a power the legislature may forego exercising, and when it does that it leaves its exercise to some other agency authorized by its law to act, to wit, this corporation. In many instances this is done as to all rates, and for the company before us it is done, except as to the maximum passenger rate. The regulating and fixing of rates, therefore, is not an inalienable exclusive function of the legislature. And if it may leave that to the corporation, why may it not delegate it to a different body? The public interest involved is the same, whether reached by the corporation, or by supervisory commission."

So we find the State supreme court of Florida itself holding, in substance, that the legislature may by valid contract part with the right to regulate rates and confer it upon such a corporation as a common carrier, for instance, and thus place it beyond the power of the State to thereafter regulate rates.

But that is the rule, perhaps, in all jurisdictions, as we have seen. So that the question arises, if the legislature had the power before the adoption of the constitution of

1885, and independent of section 30 of article XVI, to prevent abuses, regulate rates, etc., as it certainly did have, what office or function did this provision perform in the constitution of 1885, except that of furnishing a "response to a popular demand for some provision on the subject?" To what greater extent does the constitutional provision limit the contract than it would have done if the constitution had been silent on the subject? In the light of both reason and authority, the status of the contract would have been the same under either condition, so that the position of defendant in error and that of the supreme court of the State of Florida are untenable.

The provision, as we have seen, merely declared a power to exist in the legislature which had ever existed in that body, and which it was to exercise or not, as it might see proper. There was nothing to prohibit the city council from doing as it pleased until the legislature should have acted, and when it acted it could just as well have acted one way as another.

The constitutional provision was not self-executing. It was dormant, requiring the action of the legislature to vitalize it, and until this was done could not form a part of or be written by implication into any contract.

Cooley on Const. Lim., 119–121.

A. & E. Enc., 2d Ed., 919.

Sharp *et ux. v.* National Biscuit Co., 78 S. W. Rep., 787.

"The power mentioned in this section," says the Florida supreme court, in this case, "is full power;" and, further, that the same power is given in section 1, article 3, of the same constitution. This section contains nothing more than the general grant of powers to the legislature to be found in all American State constitutions. But the powers given under both were the same, so far as the right to regulate rates is concerned, at least so says the supreme court of

Florida. But we submit that if the same power is given under both sections, why is it not as potential under the one as under the other? Why could it be surrendered under article 3, section 1, as the Florida supreme court says it may, and not under article 16, section 30? The power conferred in the former was just as "full," as "ever-present," as "ever-continuing," as under the latter. Both required legislative action to make them effective.

Charters to private corporations, when accepted by the incorporators, are held to be in the nature of contracts between the incorporators and the legislators (Cooley, Const. Lim., 391–3).

But with no reservation of the power to regulate, or with said constitutional provision dormant upon the acceptance by the water works company of the provisions of the contract, the entire instrument became sacred and free from impairment.

c. But chapter 5070, above referred to and under which said ordinance No. 274 was passed, does not confer upon the City of Tampa nor does it undertake to confer upon it the power to regulate the rates fixed in ordinance No. 7 and those amendatory thereof. On the contrary, it has a proviso, which saved, if such a provision was necessary to save, the contract between the city and the Tampa Water Works Company from the effect of the statute. It is therein provided that—

"This act shall not be construed so as to impair the validity of any valid contract heretofore entered into between any city, town or village and any person, firm or corporation for the supply of water to such city, town or village or its inhabitants."

We have seen and will still further show that the contract is a valid one. Indeed, the supreme court of the State,

when this case was before that tribunal, recognized for the purposes of its decision the validity of said contract. That being admitted, chapter 5070 does not in any way affect the contract or authorize the city to interfere with it. We may add further that in the absence of legislative authority the city would have no power to regulate rates.

d. The declaration in section 8, article VIII, of the constitution of the State of Florida, that the legislature shall have the power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter and amend the same at any time, does not take away from the legislature the power to permit a city to contract with a corporation for a definite time and to fix rates for the furnishing of the city with water during such time.

The power thus given to the legislature is also one that it had before, indeed it is a power inherent in the legislative body.

But its right to abolish, to alter and amend, does not give the right to a municipality to interfere with vested rights. These cannot be affected by legislative action, either directly or indirectly.

Beach on Pub. Cor., secs. 110–112.

III.

Having the power to contract, the city did actually contract with the plaintiff in error, or, what is the same thing, with those who were authorized to assign and who did assign all the rights, privileges, and franchises granted to the corporation.

Not only did it contract to furnish rates to the city for a period of thirty years, but the contract bound the city and inhabitants to pay the rates mentioned, so that they could not be reduced without the consent of the plaintiff in error during that period or any part thereof.

The contract as embraced in ordinance No. 7 in its very first section recites that "in view of the urgent necessity for the better protection against fire, and also to obtain for the use of the inhabitants of said city an abundant supply of good water for all purposes and upon terms hereinafter mentioned, the exclusive right and privileges to construct, maintain, and operate water works for a public and private supply of water within the said city for a term of thirty years is hereby granted," etc. Then section 2 contains the statement that the conditions upon which these privileges and franchises are granted are made the subject of a contract made and entered into between the City of Tampa, by the mayor and council of said City of Tampa, and the said Jeter & Boardman, which reads as follows: "And is hereby made a part of this ordinance." Then follows the contract with said terms and conditions, the obligations of the water works company, on the one side, to furnish an adequate supply of good water to the city and its inhabitants, for all purposes, of the city and its inhabitants on the other, they to pay, the one for hydrant rentals, the other the rates to be fixed by the company up to the named maximum, which

prices are ratified and confirmed in section 6, while the whole contract, rates and all, is again ratified and confirmed in section 12.

This is what the said city did at the time of entering into the original contract. But twelve years thereafter, during which long period the city and its inhabitants had enjoyed the benefits of the system of water works which the company had furnished, the city again, in an agreement with the plaintiff in error, as set forth in the resolution of October 4, 1899, recognized as valid and binding said contract in every particular, and that the rates could not be changed except with the consent of the company, for in this agreement it is the company that undertakes to reduce, not the city.

After the preamble, which reads:

"Whereas there is in existence and in force a valid contract between the City of Tampa and the Tampa Water Works Company, which said contract is hereby recognized by both the City of Tampa and the Tampa Water Works as binding upon the parties.

"And, whereas there is now pending in the circuit court of Hillsboro county, State of Florida on the chancery side thereof, certain litigation between the City of Tampa on the one part and the Tampa Water Works Company on the other, over the construction of said contract, heretofore entered into between the City of Tampa and the Tampa Water Works Company, as aforesaid, and,

"Whereas it is to the mutual interest of both parties that said litigation should be terminated, and

"Whereas the parties have come to the following agreement, in words and figures following:

"This agreement made and entered into this 4th day of October, A. D. 1899 by and between the City of Tampa of the first part, and the Tampa Water Works Co., party of the second part,

"Witnesseth: That the said Tampa Water Works Company, for and in consideration of the covenants hereinafter mentioned, to be performed by the party of the first part, agrees from and after January 1st, 1900, to reduce the water rates specified in the contract existing between the said parties in the following respects, to wit:"

Then follows a statement of the rates to be reduced and the proposed reductions thereof.

Could the intention of the city be more plainly stated or the contract be stronger? Could the right of the company to charge these rates until it should agree to a change be more clearly fixed? Certainly not. It was just such a contract as was held valid in the cases, Detroit *v.* Detroit City Street Ry. and Los Angeles City Water Co. *v.* City of Los Angeles, *supra.*

IV.

The original contract between the City of Tampa and the Tampa Water Works Company has been ratified by the legislature of Florida.

The Revised Statutes of Florida went into effect as a new code of laws on June 13, 1892, by virtue of an act of the legislature approved June 8, 1891.

After sections 725 and 726 thereof had declared certain towns and cities theretofore legally incorporated, which embraced in their terms the city of Tampa, section 727 of said Revised Statutes then declared valid all the acts and doings of cities and towns included in the last two foregoing sections, in the following language:

"All acts and doings of cities and towns included in either of the last two foregoing sections, and of the governments and officers of the same, done under any law of the State of Florida, are declared valid; and said municipal corporations and governments, and all the officers of the same, shall have all the powers and privileges granted them by said law, approved February 4, A. D. 1869, and all subsequent laws relating to municipal corporations, and the governments of the same."

Chapter 4881 also legalized the assessments of 1888 to 1898, inclusive, and the levies of taxes by the City of Tampa

for the years of 1888 to 1898, inclusive, *which included assessments for the payment of hydrant rentals provided for in said contract.*

The phrase "all acts and doings" certainly embraces a contract such as that between the City of Tampa and the Tampa Water Works Company and validates them where, if at all, validation is necessary, as much so as if they had been mentioned in the section. The legalizing of the tax levies and assessments under the circumstances would have the same effect.

Not only may such ratification be done by positive language, but it may also be accomplished indirectly and in many ways (Morawetz on Corporations, sec. 651).

Basshor & Stebbins *v.* Dressel, 34 Md. —:

In this case certain persons had formed a company for the purpose of mining under the name of the Baltimore Crome Mining and Manufacturing Company. Subsequently the legislature passed an act to amend the charter of said company by empowering it to increase its capital stock. The legality of the original corporation having been attacked in a suit brought by the creditors of the corporation, the court held that the act last above mentioned legalized the corporation, the court using these words:

"We are convinced that any defect whether vital or formal that may have existed in the original corporation, because of its attempted combination of a mining and a manufacturing company, have been cured by competent authority."

After reciting the act the court proceeds:

"We regard this act as a legislative recognition of the validity of the existing corporation, and as having the effect to cure the defect, if any existed, in the original certificate of incorporation."

The case of Richards *v.* Merrimack and Connecticut River R.R. Company, 44 N. H., 147, is to the same point. The

railroad company had issued bonds, which it was claimed the corporation had no right to issue, as the legislature had not given any authority to execute the mortgage covering the same. By an act of the legislature approved subsequently to the issuing of the bonds the trustees were authorized to sell the mortgaged property. This was held to be a sufficient recognition and ratification of the validity of the bonds.

The court says:

"We cannot assent to the broad terms in which it seems to be asserted that the legislature may interfere with private rights, yet we entertain no doubt that the legislature may waive the public right to object to the rights of others, because they are opposed to the public interest; and where any act is void by reason of a want of legislative power, the legislature may waive the objection and justify the act (page 136).

In case of Black River and Utica R. R. Company *v.* Banard, 31 Barb., 258, the court takes a similar position. Action was brought to recover the balance of subscription alleged to have been made by defendant to the capital stock of plaintiff's company. One of the defenses was the illegality of the proceedings for the organization of said company. The legislature on two or three occasions had passed laws which recognized the existence of the corporation.

The court says:

"When in the organization of a railroad company irregularities occur, and the company goes on acting as an incorporated company, and while in the exercise of all its corporate functions, is recognized by the legislature as a corporation, it becomes by such recognition *ipso facto* legally incorporated."

The case of The United States Mortgage Company *v.* J. Cross *et al.*, 93 Ill., 483, is to the same effect. A certain foreign corporation had, without authority of law, commenced

doing business in the State of Illinois. Such corporation made a loan of money, secured by a mortgage on real property in that State. The court held the loan illegal, but that a subsequent act of the legislature, which permitted foreign corporations to do business in that State and further provided that any corporation that may have loaned money might have the same rights and powers for the recovery thereof, subject to the same penalty for usury as citizens of that State, cured the defect.

The case of Hall *et al.*, trustees, *v.* The Sullivan Railway, decided in the United States court, N. H. district, also contained in Redfield's Railroad Cases, vol. 2, page 621, presents a case similar to those above cited. The legality of the issue of certain bonds by the railway company was questioned, and the court says that the legislature of that State by the statutes passed after the execution of this mortgage had impliedly recognized it as a valid security, and that this action was equivalent to the grant of an express authority to execute the mortgage.

In the case of Los Angeles *v.* Los Angeles City Water Company, *supra*, first decided by Judge Welbourne, district judge of the southern district of California, and afterwards upon appeal by the Supreme Court of the United States (20 Supreme Court Rep., 736), the question of the subsequent ratification of a contract was one of the leading features passed upon by the court. The California statute under which the contract was entered into had a provision preventing municipalities from depriving themselves by contract with water works companies of the power to regulate water rates. The contract reserved the right to regulate these rates, and provided that such rates should not be reduced or the prices so fixed as to be less than a certain rate named. A subsequent ordinance undertook to reduce rates below those fixed, the council claiming the right so to do on the ground that the former city council could not contract away their rights to regulate rates. A subsequent statute, however,

ratified the contract, to which the court below and above gave effect, declaring the contract to be valid and restrained the enforcement of the ordinance reducing the rates below the minimum fixed in the contract.

We are, therefore, justified in the conclusion that even if said contract, with all its *amendments*, was not legal and binding from the beginning, that it has since been validated in all its details by legislative enactment.

V.

The contract in all its details and as to every question raised was adjudicated in favor of plaintiff in error by the dismissal of the suit on January 24, 1900, then pending in the circuit court of Hillsborough county, State of Florida, in accordance with the terms of the agreement embraced in the resolution of October 4, 1899.

The substance of the allegations of the bill filed in that case was set forth in the amendment to the original bill filed in this suit by plaintiff in error on the 29th day of December, 1902, as well as the substance of the answer interposed by defendant in error here and defendant in that case. The plaintiff in error in this amendment alleged that the bill filed by the City of Tampa on the 24th day of January, 1899, attacked said contract between the water works company and the city, as well as ordinances Nos. 7, 42, and 51, asking that the city be released from its obligations under said contract and ordinances, and that the same be canceled on the ground, among others, that the City of Tampa had no right to enter into said contract and to fix its rates beyond the power of the city to change them for a period of thirty years, or to bind the city to guarantee the payment of interest on the bonds of the

water works company, and claiming that said city had the authority at any time to change said rates and substitute lower rates therefor; and, further, that said contract was null and void and should be canceled. Said amended bill also alleged that the answer interposed to the bill of said city of January 24, 1899, asserted that the water works company had fully complied with its said contract, denied that the same was null and void on account of any of the things mentioned in said bill, or that it should be canceled therefor; denied the right of the city to pass a certain ordinance, No. 199, which affected the rights of the water works company, and further stated that said answer also contained a general demurrer to said bill. Said amendments further alleged that all matters set forth in said bill of January 24, 1899, and in the answer thereto, including the question as to the legality of said contract in all its details, as also the right to contract for a period of thirty years for fixed rates so that they could not be changed by said city during said entire period, were raised and presented in said proceedings, and were, by reason of the order and decree dismissing said suit, determined and adjudicated against the contention of the City of Tampa; that said decree dismissing said suit was still undetermined, and that the questions thus settled were *res judicata*. The amendments also set forth the agreement of October 4, 1899, and the dismissal of the suit thereunder.

We contend that appellant, by demurring to the bill and amendments filed in this case, has admitted each and all of the allegations.

Beach on Modern Equity Practice, section 228, says:

"A demurrer admits the truth of all the facts in the bill which are well pleaded."

Herman on Estoppel and *Res Judicata*, section 1222 quotes approvingly the language of the supreme court of

Wisconsin in the case of Keenland *v.* Gilman, 24 Wis., 39, as follows:

"But of late years, much more than formerly, the doctrine of estoppel, most wholesome and just in its operation when properly applied, has been extended to these municipal corporations so as to bind and conclude them by their own acts and acquiescence, and the acts and acquiescences of their officers, whenever an estoppel would exist in the case of natural persons. It is now well settled that as to matters within the scope of their powers and the powers of their officers, such corporations may be estopped upon the same principles and under the same circumstances as natural persons."

We contend further that such a dismissal rendered the matters embraced in the bill and answer and raised in the proceedings *res judicata*, the parties being the same in both suits (Herman on Estoppel, *Res Judicata*, section 197).

"This is the rule of every system of jurisprudence, not only from its obvious fitness of justness, but if it were otherwise there never could be an end to litigation."

Indeed, this is the general rule, but it is especially applicable to cases dismissed upon agreement (*Ibid.*, section 255, and authorities cited; see also section 273).

The dismissal of a bill by consent as well as adversely is a bar to a second suit for the same object, and the defendant may avail himself of this defense by motion to stay proceedings.

But it may be claimed that this rule does not apply to cities in Florida on account of a lack of authority in them to bind the inhabitants in such matters. It will be remembered, however, that municipal corporations in Florida, and especially the City of Tampa, had the right to sue and be sued, to plead and be impleaded, which certainly embraces all powers necessary to carry on and conclude litigation.

There is no limitation whatever upon the power given them in this direction.

The case of Pres. and Trus. of the Town of Petersburg *v.* Wm. Mappin *et al.*, 14 Ill., 193, throws much light upon this subject. In that case the trustees of the town of Petersburg had undertaken to compromise and settle a claim against the city. The court says that while the trustees of a town possess only such powers as are expressly conferred by their charter or such as are necessary to carry into effect the powers granted, that nevertheless the power to sue and be sued includes the authority to settle all just claims, and a settlement of an existing controversy by the trustees in good faith binds the corporation, although they cannot dispose of its property by way of gratuity.

We have said that it was the intention both of plaintiff and defendant in error, as it was their right in entering into the agreement of October 4, 1899, to put an end to all controversies and litigation between the parties. The company had then, as it has now, according to the allegations in the bill, a valid contract with the City of Tampa to furnish it with water and had up to that time, as it has done since, complied with every obligation imposed upon it by said contract. It had extended its mains whenever required to do so; had erected a large and necessarily expensive plant; had laid down many miles of pipes and mains, and had furnished the city of Tampa, as it has been doing since, with all the water needed for fire protection, domestic or other purposes, for which it had been collecting the rates agreed upon in ordinance No. 7, as it had been collecting those as fixed in the ordinance of 1899. All this and more was charged in its bill and is admitted by the demurrer to be true.

In order that it might better furnish protection to property in the city and carry out in every respect the object and purpose of its creation, it was important that it should not be further hampered by disputes or vexatious litigation with appellant. It was, therefore, a thing greatly to be desired

that an end should be put to such disputes, and that all litigation should cease. Hence the agreement of October 4, 1899.

VI.

Ordinance 274 impairs the obligation of the contract between the City of Tampa and plaintiff in error, constitutes a taking of its property without due process of law, and denies to it the equal protection of the law.

A valid contract existing between the City of Tampa and the Tampa Water Works Company, with no right reserved to alter or change the same, either in the organic law of the State or in the statutes of Florida, the enforcement of ordinance 274 would impair the obligation of said contract and take the property of the water works company without due process of law, in that it would reduce the prices it is permitted under such contract to charge and as therein fixed.

It will be seen by a comparison of the rates, as fixed in that ordinance and those as established in the contract and the amendments embraced in the resolution adopted by the council on October 4, 1899, that the latter are materially reduced in many instances at least one-half, while the minimum meter rate, as placed in ordinance 7, was taken away entirely. This minimum rate had been fixed in the original contract at $25. It is therein provided that "in no case where meters are used shall annual charges be less than $25, whether they register water of that value or not." This provision had not been changed by the amendment of October 4, 1899. But we contend that ordinance 274, in stating "that when water is furnished through meters the charge shall be per hundred cubic feet 10 cts.," making no reservation as to the minimum charge, but prescribing a penalty for a violation of any of the provisions of the ordi-

nance and for a refusal to furnish water to the city or any of its inhabitants in compliance with the terms of said ordinance, coupled with a provision repealing all ordinances or parts of ordinances in conflict therewith, had the effect not alone of reducing the minimum rate, but of taking it away absolutely.

Certainly the right to regulate, if it were conceded to exist, could not be held to embrace the right to destroy.

We are not without authority upon this point (Los Angeles *v.* Los Angeles City Water Company, 177 U. S., 558). In that case the city was authorized to regulate, but not to go below a certain minimum. Attempting to do this, however, the court held that the city did not have the power to reduce below the minimum as fixed.

But, with the power in neither the legislature nor the city to regulate, it requires no argument to show that a reduction of the rates, as provided for in ordinance 274, would impair the obligation of said contract and amount to the taking of the property of plaintiff in error without due process of law.

When the City of Tampa, the creature and agent, so to speak, of the legislature, passed ordinance 274, reducing the water rates to be charged thereafter by plaintiff in error, they took from appellee property rights lawfully acquired under its contract without making due compensation therefor, as much so as if they had repealed both the charters of the city and of the water works company and canceled said contract. Indeed, as much so as if they had confiscated to the use of the city half its earnings after they had been collected and in the company's treasury.

Scott *v.* City of Toledo, 36 F. R., 395.
C., B. & Q. R. R. *v.* Chicago, 166 U. S., 226.
Mount Hope Cemetery *v.* Boston, 158 Mass., 509.
Gardner *v.* Newbury, 2 Johns. Ch., 162.
Sinneckson *v.* Johnson, 17 N. J. L., 129.
Harness *v.* C. & O., 1 Md. Ch. Dec., 249.

Henderson *v.* Ry. Co., 21 F. R., 358.
Baker *v.* Norwood, 74 F. R., 997.
Davidson *v.* New Orleans, 96 U. S., 102.
Kentucky Railroad Tax Cases, 115 U. S., 331.
New Memphis Gas & Light Co. *v.* City of Memphis, 72 F. R., 952.
Lake View *v.* Rosehill Cemetery Co., 70 Ill., 198.
Board of Education *v.* Blackwell, 122 Ill., 348.
Rigney *v.* City of Chicago, 102 Ill., 77.
Chicago & Western Indiana R. R. *v.* Englewood, etc., R. R. Co., 115 Ill., 385.

A like chain of reasoning would also lead to the conclusion that the enforcement of ordinance 274 would deny to plaintiff in error the equal protection of the laws.

We hence conclude that the rates as fixed in ordinance 7, as amended October 4, 1899, became a part of the contract between the plaintiff and defendant in error and cannot be changed by the latter without the consent of the former. We have, therefore, brought this case here feeling that the Florida court committed an error in deciding in favor of the validity of ordinance 274, and respectfully submit the same with confidence that this court will right the wrong, which we ask may be done.

Respectfully submitted.

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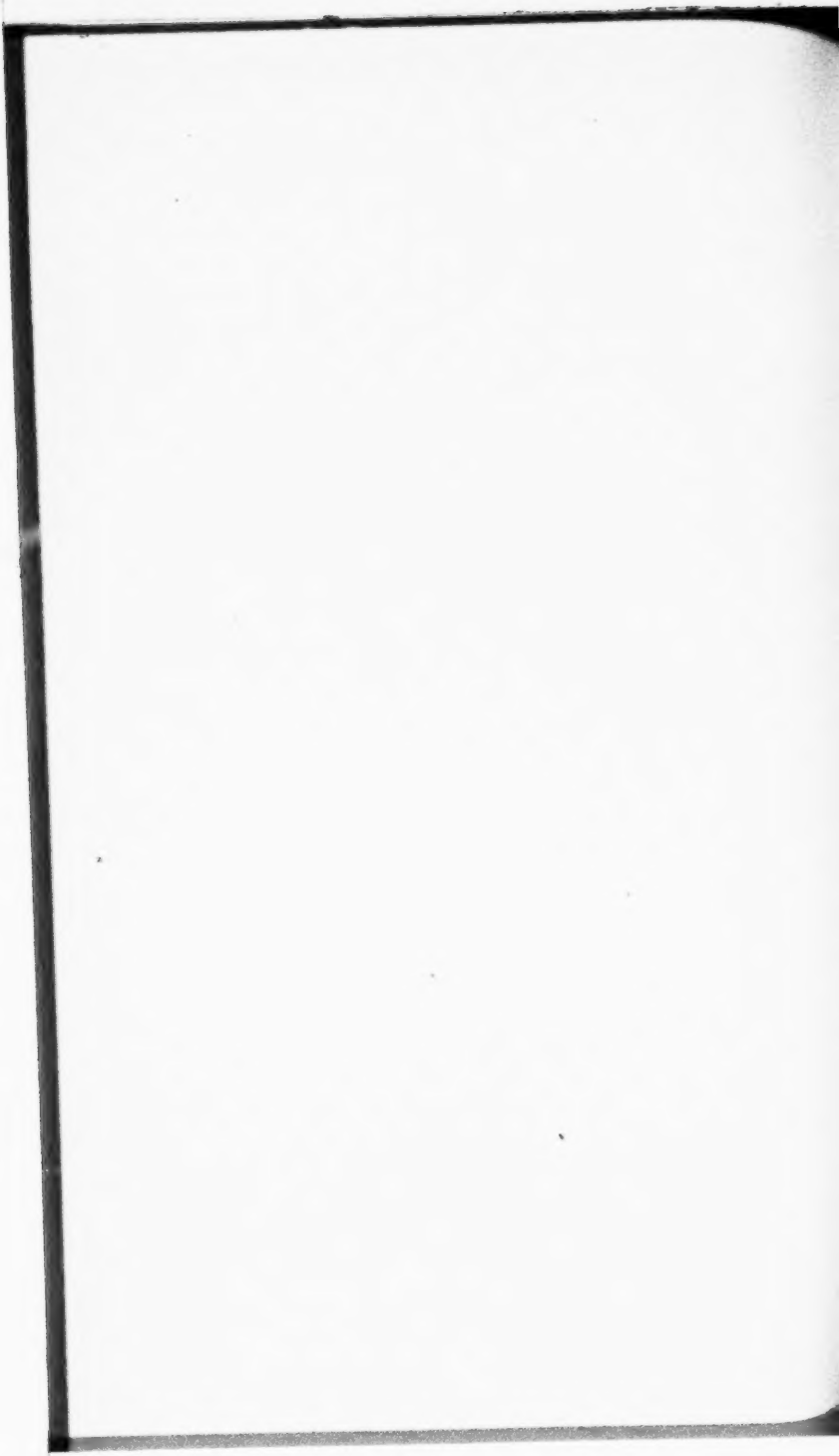
PETER O. KNIGHT,
Counsel for Plaintiff in Error.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 29.

THE TAMPA WATER WORKS COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF TAMPA.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

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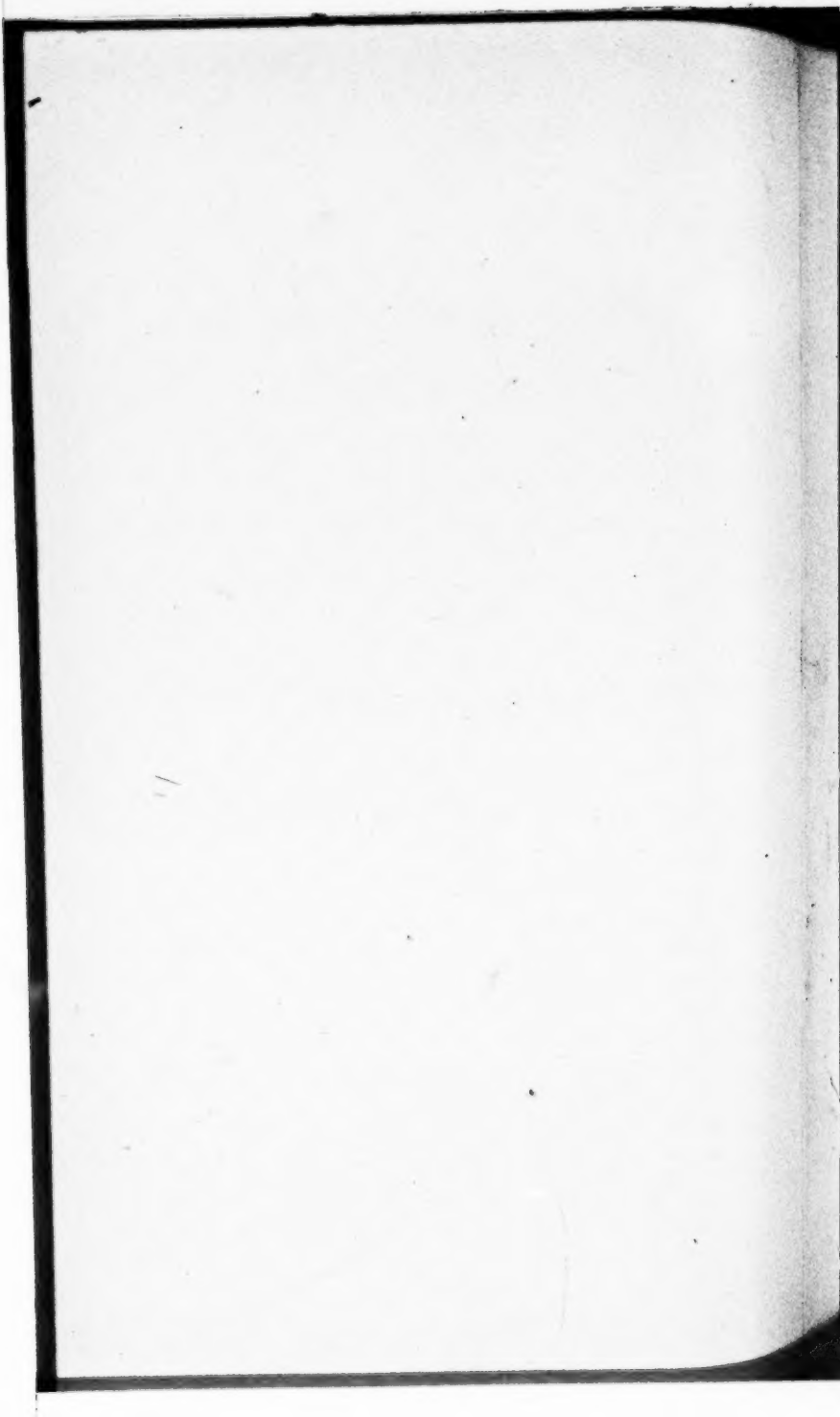

SUPREME COURT OF THE UNITED STATES.

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THE CITY OF TAMPA, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

Since the filing of the brief for plaintiff in error we have been furnished a copy of that of defendant in error, to which we respectfully ask permission to reply.

In the argument heretofore submitted we endeavored to establish, and trust that we did establish, among others, the proposition that section 30, article XVI, of the constitution of the State of Florida, upon which the State supreme court predicated its opinion in this case, gave no more power to the legislature than it would have had without such provision and under the general grant of powers to be found in all the State constitutions; that this section was not written into and did not become a part of the contract between the city and the water works company; that it required legislation to give it force; that when the legislature did act as

it is claimed (by defendant in error) it did, by the enactment of chapter 5070, Acts of 1901, page 240, it especially reserved from the operation of said act all valid contracts theretofore "entered into between any city, town or village, and any person, firm or corporation for the supply of water to such city, town or village, or its inhabitants," and that the contract between plaintiff and defendant in error was and is one thus protected.

We likewise submitted to the court, with confidence in the correctness of our position, the proposition that if said section of the constitution gave no more power to the legislature than was contained in the general grant of powers to be found in all the State constitutions, in face of which this and other courts have held inviolable contracts fixing rates, tolls, and charges for services of a public nature, that this contract should likewise and on the same grounds be sustained and held sacred from legislative interference.

ARGUMENT.

A.

The above propositions have not been successfully assailed by the defendant in error. The case of Davis *vs.* Burk, 179 U. S., 399, cited no doubt by the defendant in error to establish the proposition that said section 30, article XVI, of the State constitution was self-executing, does not sustain that contention. The constitutional provision involved in that case provided that no person shall be held to answer for a felony or criminal offense of any grade unless upon presentment or indictment of a grand jury or on information of the public prosecutor after a commitment by the magistrate. This court held that the provision needed no legislation to give it effect and was self-executing, while in the text of the opinion it was said:

"Where a constitutional provision is complete in itself, it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of a certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution."

That is the case with the provision under consideration, which is as follows:

"The legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures."

It will be seen that the provision not only recognized a power already existing in the legislature, but that it required legislation to make it effective. The time and method of action, indeed all limitations of whatever kind, were left with the legislature.

The constitution, section 1, article 3, contains the general grant of power to the legislature. This action is in the following language:

"The legislative authority of this State shall be vested in a senate and a house of representatives, which shall be designated, 'the legislature of the State of Florida' and the sessions thereof shall be held at the seat of government of the State."

This grant of power certainly comprehends all those embraced in section 30, article XVI.

B.

Equally inapplicable, in our opinion, are the authorities cited in support of the cognate proposition that under this provision the city had the right to alter the rates fixed in the contract and amendments thereto.

The case of Stanislaus County *vs.* San Joaquin and K's R. C. & T. Co., 192 U. S., 201, grew out of an effort on the part of the members of the board of supervisors of Stanislaus county, California, to "designate" the rates to be thereafter charged by the company, the same as thus designated, being lower than those theretofore charged. The company was organized under a statute which authorized it to charge and collect such rates as it might see proper, but subjected the same to regulation by the supervisors, with a proviso, however, that such rates should not be reduced so low as not to yield a certain rate per month on the investment.

There was also a State constitutional provision which gave the legislature the right to repeal or alter the charters of all corporations organized under this law. This court held that there was no such contract as would be protected under the Constitution of the United States, and, further, that if it might otherwise have been protected the provision above referred to gave the legislature power to regulate. In that case there was no contract between the county and the company, as there is here between the city of Tampa and the water works company, fixing the rates to be charged, and no reservation of power in the charter to alter or amend the the same or change the rates in any way.

In the case of The Knoxville Water Company *vs.* The City of Knoxville, 189 U. S., 434, it appeared that the company was organized under an act which expressly recognized the right of the city to regulate water rates; and upon investigation of the other cases cited by the learned counsel for defendant in error to the above proposition they will be found differing radically in the facts presented from the one at bar.

C.

1. Nor does section 8, article VIII, of the Florida State constitution justify the proposed change in the water rate. This section provides that—

"The legislature shall have power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time. When any municipality shall be abolished, provision shall be made for the protection of its creditors."

The power here given was one inherent perhaps in the legislative body, and which it would have had without said provision; but, be that as it may, the power furnished no sort of authority for the passage of ordinance 274. A municipal corporation is a mere agent of the government, a mere depository of political power conferred by the legislature. Its charter is not a contract, as is the charter of a private corporation, and hence the legislature can do with municipalities as it pleases (Beach on Public Corporations, sections 63 and 64).

2. But the exercise of the right to alter or amend the charter of the city of Tampa cannot affect or destroy the rights of the plaintiff in error under the contract (Beach on Public Corporations, sections 64, 78, 216, 432, 726–727.)

3. Nor is plaintiff in error complaining of any effort to alter or amend the charter of the city of Tampa, but of an effort to violate what it believes to be the terms of a valid contract between the city and the water works company.

D.

There was no admission in the bill that the rates were unreasonable. The State court, in its opinion by Justice Carter, held that the reasonableness of the rates was not involved. (See Record, page 50.)

A voluntary reduction of the rates by agreement with the city council twelve years after they were originally fixed could not be construed as an admission that the rates as originally established were unreasonable.

E.

The contract is not void, nor can it be avoided because of the allegations in the bill of complaint that the inducement to invest the money of the plaintiff in error in said water works plant was that the rates as fixed in said contract should remain throughout the life of the contract. We have shown, we trust, that the parties had the right to contract and to fix rates, *whether within or beyond the power of the city to change*, being the question here.

F.

The amendments to said contract by agreement between the plaintiff in error and defendant in error in 1899 were not in violation of chapter 4166, Laws of Florida, passed in 1893, Acts, page 94, and referred to by counsel for defendant in error. This act is as follows:

"SECTION 1. That the council of any city or town of this State is hereby authorized and empowered to enter into an agreement or agreements with gas, electric light or water works companies for lighting the streets or constructing and operating water works in such city or town: *Provided*, That such agreement or agreements shall be ratified by a majority vote of the freeholders of such city or town, and voting at an election to be held for the purpose of ratifying said agree-

ment or agreements: *Provided further*, That a copy of the agreement or agreements, together with a notice of such election, shall be published in a newspaper in such city or town for four consecutive weeks prior to said election.

"SEC. 2. That under the provisions of this act no city or town in this State shall through the council of said city or town, contract or agree to pay in any one year for any one of the purposes enumerated in section 1 of this act, a sum of money exceeding four mills on the assessed valuation of the property in such city or town."

1. It is clear that this act was intended to apply, and does only apply, to future contracts, and not to amendments of contracts that are already in existence, under which water works had been constructed and were being operated. It gives the city council power and authority "to enter into any agreement or agreements with * * * water works companies for constructing and operating water works in said city or town." As the water works plant here had already been constructed and was in operation, the act could not, and was not, intended to apply to a case like this.

2. Besides, it is not shown that the provisions of the law were not complied with. Indeed, the allegations of the bill are to the effect that the contract, including, of course, all the amendments thereto, was a legal and binding contract, which the demurrer of the defendant in error admitted to be true. If defendant in error had desired to negative a compliance with the provisions of any statutes bearing upon the subject-matter of the contract, or any of the amendments thereto, between the city and the water works company, it should have done so by answer.

G.

Chapter 3605, Laws of Florida, Acts of 1883, cited by counsel for defendant in error, does not apply to said contract, as the requirements in said chapter were clearly inconsistent

with the power granted in section 7 of the city charter, quoted in original brief for plaintiff in error, page 5. In this charter a majority of the city council, in whom the government of the city was vested, had the power to pass all ordinances necessary to provide for the establishment of water works, including the power to fix rates and to make assessments for the payment of hydrant rentals.

H.

There was no violation of section 10, article 9, of the constitution of the State of Florida, which provides that—

* * * "The legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual."

There was no loaning of the credit of the city to the company. The contract did say that the city does hereby guarantee the payment of the interest to accrue upon the bonds which may be issued by the Tampa Water Works Company (see Record, pages 13 and 14), but the entire clause shows that nothing more was meant by the use of this language than that the city would pay the amount of the interest to accrue on the bonds of the company to the holders of the coupons thereto attached. To that extent and no further does the provision go. Instead of paying the rentals to the company, the city agrees in this clause of the contract to pay them to the holders of the coupons, which coupons are made payable at the office of the treasurer of the city of Tampa. It will be observed that the amount to be paid upon said coupons as fixed in the original contract was the precise amount, $4,950, which the city had agreed to pay for hydrant rentals.

I.

Chapter 1639 of the General Incorporation Laws of Florida, under which the Tampa Water Works Company was incorporated, is not unconstitutional, as claimed by the defendant in error. True, section 13, article V, of the constitution of 1868, in force at the time said act was passed, as well as section 14, article IV, of the constitution of 1885, in effect when the company was organized, provides that—

"All grants and commissions shall be in the name and under authority of the State of Florida, sealed with the great seal of the State, signed by the governor, and countersigned by the secretary of state."

But it was not under this provision that said chapter 1639 was passed, but the act was passed in response to section 22, article IV, of the constitution of 1868, which provision was embodied in section 25, article III, of the constitution of 1885, and is as follows:

"The legislature shall provide by general laws for incorporating such municipal, educational, agricultural, mechanical, mining and other useful companies or associations as may be deemed necessary."

It is very clear that the grant referred to in section 13, article V, of the constitution of 1868, and in the same provision embodied in section 14, article IV, of the constitution of 1885, did not embrace within its meaning corporate rights and franchises.

These were to be provided for under general laws which might or might not require letters patent under the great seal of the State. The word "grant" was therein used in the ordinary sense of the word, in this country at least, and was intended to cover transfers by the State of lands or some interest therein.

That this was the construction placed upon it by the State legislature, the courts, and the legal profession of Florida is evidenced by the fact that this general law, passed in 1868, was not repealed or changed materially until the enactment of the Revised Statutes which went into effect in 1892; that its constitutionality was never during all these years challenged in the courts, so far as the reports of the State supreme court disclose, and that during the same time the legislature was accustomed to pass special laws for the incorporation of companies and associations for every variety of purposes, and that, too, without requiring letters patent or other document or writing under the seal of the State.

Besides, the defendant in error is not in a position to deny the legal existence of the Tampa Water Works Company. The city of Tampa has been dealing with this company as a corporation for years and cannot deny collaterally the existence of the same (Beach on Private Corporations, sec. 13, and authorities there cited; Town of Enterprise *et al. vs.* State *ex rel.*, 29 Fla., 128; sec. 2159, Rev. Stat. of Fla., which declares that: "ESTOPPEL.—No body of persons acting as a corporation under this chapter shall be permitted to set the want of legal organization as a defense to an action against them as a corporation, nor shall any person sued on a contract made with the corporation, or sued for an injury to its property or a wrong done to its interests, be permitted to set up a want of such legal organization in his defense.")

J.

There can be no objection to the contract because it undertook to grant exclusive privileges.

1. It has often been held that a contract or ordinance granting an exclusive right to furnish gas or water is not unconstitutional and is not a monopoly, for unless limited by the constitution the legislature may grant exclusive privileges (N. O. Gas Light Co. *vs.* La. Light Co., 115 U. S.,

650; St. Tammany, etc., *vs.* N. O. Water Works, 120 U. S., 64; Memphis *vs.* Water Co., 5 Heiskel, 529; B. & L. P. F. Co. *vs.* Hawkey, 31 Md., 339; Des Moines, etc., Co. *vs.* Des Moines, etc., Co., 73 Ia., 573; Indianapolis Cable St. Ry. Co. *vs.* Citizens' St. Ry., 127 Ind., 369).

2. But, even if the clause granting exclusive license for the period mentioned were invalid, such fact would not render the remainder of the ordinance void (Corcoran *vs.* Lehigh and Franklin Coal Co., 138 Ill., 390; Bank of Hamilton *vs.* Dudley, 2d Peters, 492; Keokuk Packing Co. *vs.* Keokuk, 95 U. S., 80; Fla. Central R. R. Co. *vs.* Schutte, 103 U. S., 447; Vial *vs.* Penniman, 103 U. S., 714; Hills *vs.* National Albany Exchange Bank, 105 U. S., 319).

3. Neither can the city of Tampa in this suit question the constitutionality of the clause of the contract granting exclusive privileges. None but a party seeking to compete with the water works company or seeking to erect water works to furnish water in competition with the plaintiff in error would have that right (Ill. Trust and Savings Bank *vs.* City of Arkansas City, 76 Fed. Rep., 271; Columbus Water Works Company *vs.* City of Columbus, 48 Kan., 99, 112; Dodge *vs.* City of Council Bluffs, 57 Ia., 560).

The same argument and authorities would apply to section 30, chapter 1639, cited in original brief.

Other minor objections to said contract are raised in the brief of defendant in error, and all of which are covered by the original brief filed by the plaintiff in error.

Respectfully submitted, with the request that this brief may be filed and considered with and as supplementary to the original filed herein.

S. M. SPARKMAN,
W. A. CARTER,
E. L. SPARKMAN,
PETER O. KNIGHT,
Counsel for Plaintiff in Error.

FILE COPY.

TAMPA WATER WORKS COMPANY,
PLAINTIFF IN ERROR,
vs.
CITY OF TAMPA, DEFENDANT
IN ERROR.

No. 29

Office Supreme Court U. S.
FILED
OCT 6 1904
JAMES H. McKENNEY,
Clerk.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

HUGH C. MACFARLANE,
JAMES F. GLEN, AND
JOHN P. WALL,
COUNSEL FOR DEFENDANT IN ERROR.

TAMPA WATER WORKS COMPANY,
PLAINTIFF IN ERROR,
VS.
CITY OF TAMPA, DEFENDANT
IN ERROR.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

HUGH C. MACFARLANE,
JAMES F. GLEN, AND
JOHN P. WALL,
COUNSEL FOR DEFENDANT IN ERROR.

IN THE SUPREME COURT
OF THE
UNITED STATES,
OCTOBER TERM, A. D. 1904.

Tampa Water Works Company,
Plaintiff in Error,
vs.
City of Tampa, Defendant
in Error.

Now comes the defendant in error in the above stated cause, the city of Tampa, by its counsel, and moves the court to dismiss the writ of error in the above stated cause upon the following grounds, *viz.*:

1st. That it appears from the record in said cause that this Court has no jurisdiction to review on writ of error the decree of the Supreme Court of Florida.

2nd. That the contentions upon which the jurisdiction of this Court is invoked by writ of error, to review the decree of the Supreme Court of Florida, are so devoid of merit upon their face as to be insufficient to require the maintenance of jurisdiction by this Court.

And, in case the said motion to dismiss the said writ of error should be denied, the defendant in error hereby moves the Court to affirm the decree of the Supreme Court of Florida, upon the following ground, *viz.*:

That the question upon which the jurisdiction of this Court depends is so frivolous as not to need further argument.

Hugh C. Macfarlane

HUGH C. MACFARLANE,
JAMES F. GLEN AND
JOHN P. WALL,
Counsel for defendant in error.

The Plaintiff in error in the above stated cause and S. M. Sparkman, Esq., its attorney of record, are hereby notified that the defendant in error will present and submit the foregoing motion to the Supreme Court of the United States, at Washington, on the 10th day of October, A. D 1904, or as soon thereafter as the same can be heard by the said Court at the next term thereof, convening on said day.

Hugh C. Macfarlane

HUGH C. MACFARLANE,
JAMES F. GLEN AND
JOHN P. WALL,
Counsel for defendant in error.

STATEMENT OF CASE.

The Florida Constitution of 1885, which became effective on January 1st, 1887, prior to the incorporation of the plaintiff in error or defendant in error, and still is in force, contains the following provisions:—

"The legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, *or performing other services of a public nature*, and shall provide for enforcing such laws by adequate penalties or forfeitures."

SECTION 30 OF ARTICLE 16; REVISED STATUTES OF FLORIDA, PAGE 69.

"The legislature shall have power to establish *and to abolish* municipalities, to provide for their government, to prescribe their jurisdiction and powers, *and to alter or amend* the same at any time When any municipality shall be abolished, provision shall be made for the protection of its creditors "

SECTION 8 OF ARTICLE 8; REVISED STATUTES OF FLORIDA, PAGE 62.

The City of Tampa was incorporated by a special act of the Florida legislature, approved June 2nd, 1887, and was given no express power to contract for a water supply.

CHAPTER 3779 LAWS OF FLORIDA, PAGE 191.

The plaintiff in error claims all its rights under and subsequent to a contract purported to have been made between its predecessors and the City on September 20th, 1887, which it succeeded to, and it alleges its incorporation in 1887, after the making of the contract between the City and its predecessors in interest.

For the purposes of this motion it may be assumed that the City had power to make a contract for water supply for a fixed period, and it may be assumed that the plaintiff in error was legally incorporated for the purpose of performing such service.

After the decision of this court in the case of Freeport Water Company v. Freeport, 180 U. S., 587, the Florida legislature, which met within two weeks after that decision, enacted almost literally the Illinois statute before the Court in that case, the Florida enactment being as follows:

"That the corporate authorities of any city, town or village, now or hereafter incorporated under any general or special law of this State, in which any individual, company or corporation has been, or may hereafter be, authorized by such city, town or village to supply water to such city, town or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation to such city, town or village and the inhabitants thereof, such charges to be just and reasonable; Provided, That this act shall not be so construed as to impair the validity of any valid contract heretofore entered into between any city, town or village and any person, firm or corporation

for the supply of water to such city, town or village or its inhabitants. But this act shall not be held to validate any contract heretofore made "

CHAPTER 5070 LAWS OF FLORIDA, ACTS OF 1901, PAGE 240.

Under that legislative authority the City of Tampa, on Decem-20th, 1901, passed an ordinance undertaking to fix rates that should be charged for the supply of water within the City, which were less than those the plaintiff in error asserted the right to charge under its contracts with the City, whose validity it maintained, and it filed a bill in the State Court to enjoin the enforcement of the ordinance mentioned, claiming that it impaired the obligation of its contracts with the City, and deprived it of its property without due process of law, but *making no claim that the rates as fixed by the last ordinance were unreasonable, or that their enforcement would not yield a reasonable return on its investment*

A demurrer to the bill was over-ruled by the State Circuit Court, and, the City standing on its demurrer, a temporary injunction theretofore granted was made perpetual. On appeal the Supreme Court of Florida reversed the order over-ruling the demurrer, directed the dissolution of the injunction, and remanded the cause for further proceedings consistent with its opinion. No application to amend the bill so as to allege that the rates fixed by the ordinance were unreasonable or unremunerative, or to amend it in any other respect, was made in the Circuit Court, and a final decree was thereupon rendered, dismissing the bill, which was affirmed on appeal by the Supreme Court, (Tampa Water Works Co v. Tampa, 36 So. Rep , 174) and is now sought to be reviewed on this writ of errror

The sole ground upon which the Supreme Court of Florida based its decision was that Section 30 of Article 16 of the State

Constitution, above quoted, reserved to the legislature the right to prevent excessive charges on the part of those performing public services such as were performed by the plaintiff in error, which reserved power neither the legislature nor the municipality, its creature, could alienate, and the regulation of such charges under the ordinance sought to be enjoined, pursuant to express legislative authority, could not impair the obligation of a contract entered into after the adoption of the Constitution.

TAMPA V. TAMPA WATER WORKS CO., 34 So. REP., 631.

ARGUMENT.

The decision of the Supreme Court of Florida, on the ground on which it was placed, is so obviously correct, and in accord with numerous decisions of this Court, that there is no color for invoking the jurisdiction of this Court to review that of the State Court, hence the writ of error should be dismissed.

Newburyport Water Co. v. Newburyport, 193 U. S., 561.

Defiance Water Co. v. Defiance, 191, U. S., 184.

A writ of error from this Court, to review the decision of the State Court, is not a matter of right, and there is no occasion for retaining it, where every question has already been settled by former decisions of this Court

Richardson v L. & N. R. Co , 169 U. S., 128.

Chanute v. Trader, 132 U. S., 210.

Section 30 of Article 16 of the Florida Constitution is self-executing (Davis v. Burke, 179 U. S., 399), and precisely the point now presented was decided in the case of County of Stanislaus v. San Joaquin etc. Co., 192 U S , 201

And there are many other cases to the same effect

Knoxville Water Co v. Knoxville, 189 U. S , 434

N. C. R. Co. v. Maryland, 187 U. S., 258.

Citizens Sav. Bk. v. Owensboro, 173 U. S , 636.

L. & N. R. Co. v. Kentucky, 183 U. S , 503.

Covington v. Kentucky, 173 U. S., 231.

Sioux City, etc. Co., v Sioux City, 138 U. S., 98

U. S. v. U. Pac. R. Co., 160 U. S., 1.

Louisville Water Co. v. Clark, 143 U. S., 1.

Gibbs v. Gas Co , 130 U. S., 396.

Spring Valley Water Works v. Schottler, 110 U. S 347.

Greenwood v. Union Freight R. Co., 105 U. S., 13.

Penna. College Cases, 13 Wall , 190.

The writ of error should be dismissed, or, if retained, the decree now affirmed.

Richardson v. L. & N. R. Co., *supra.*

Respectfully submitted.

Hugh C. Macfarlane

HUGH C. MACFARLANE,
JAMES F GLEN AND
JOHN P. WALL,
Counsel for Defendant in Error.

I acknowledge receipt of a copy of the foregoing motion, notice and brief this..... .....day of September, A. D. 1904.

.....

Counsel for Plaintiff in error.

FILE COPY.

Office Supreme Court U. S.
FILED
OCT 10 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1905.

No. 29.

THE TAMPA WATER WORKS COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF TAMPA, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

MACFARLANE & GLEN AND
JOHN P. WALL,
Counsel for Defendant in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 18545

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1905.

No. 29.

THE TAMPA WATER WORKS COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF TAMPA, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

The plaintiff in error is a water works company, engaged in supplying water to the defendant in error, a municipal corporation, and its inhabitants. The plaintiff in error claims the rights asserted by it, under and subsequent to certain municipal legislation passed on September 29, 1887, which is claimed to have constituted a contract, the obligation of which is alleged to have been impaired by subsequent municipal legislation passed on December 20, 1901, undertaking to regulate the rates to be charged for water supplied to the municipality and its inhabitants, and it is likewise claimed that the last-mentioned ordinance operated to deprive the plaintiff in error of its property without due process of law.

The two claims mentioned were made the basis of a bill for injunction, filed in the State circuit court, to enjoin enforcement of the ordinance regulating rates.

The State circuit court granted a perpetual injunction as prayed for. The supreme court reversed that decree, determined that there was no equity in the bill, and remanded the cause for further proceedings. No further proceedings were taken, and the circuit court dismissed the bill.

A second appeal was prosecuted from that decree, which was affirmed by the supreme court of Florida, on the ground that it presented no question not passed upon in the former appeal, and the proceedings are now brought before this court for review on writ of error.

Neither the plaintiff in error nor the defendant in error had corporate existence prior to the Florida constitution of 1885, and no rights are claimed or asserted anterior to the time that constitution became operative, on January 1, 1887.

Section 2 of the Declaration of Rights, contained in the Florida constitution of 1885, is as follows:

"All political power is inherent in the people. Government is instituted for the protection, security and benefit of the citizens, and they have the right to alter or amend the same whenever the public good may require it; but the paramount allegiance of every citizen is due to the Federal Government, and the people of this State have no power to dissolve its connection therewith."

Section 8 of article 8 of the same instrument is as follows:

"The legislature shall have power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time. When any municipality shall be abolished, provision shall be made for the protection of its creditors."

Section 30 of article 16 is as follows:

"The legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimi-

nation and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties or forfeitures."

The city of Tampa was incorporated by special act of the Florida legislature, which went into effect on June 2, 1887, chapter 3779, Acts of 1887, the following provisions of which are the only ones material to this case:

"*Be it further enacted*, That the said city council shall have power to make, ordain, establish and execute, for the government of the said city, such ordinances in writing, and such by-laws for the government of the said city council and its officers, not inconsistent with the constitution or laws of this State or of the United States:

"*Provided*, A majority of said city council assent thereto, as they shall deem necessary * * * to provide for the establishment of water works, electric or other lights for the streets * * * to prescribe and maintain a system of drainage and sewerage * * * to organize and provide a fire department, and to regulate the same so as to protect the city from fire * * * and to do and regulate any other matter or thing that may tend to promote the peace, health, welfare, prosperity and morals of the said city. For carrying into effect the aforesaid powers the said city council shall have the right to impose penalties for breaches of its ordinances, by fine and imprisonment in the city jail, and enforce the same by attachment summarily against the property or person of the delinquents, if the same can be found. And in addition to the powers hereinbefore enumerated, the said city council shall have all the powers and perform all the duties imposed upon them by the laws of Florida now in force, or which may hereafter be enacted, providing for the creation and government of cities and towns."

Section 12 of the same charter further provided that—

"All laws now in force or that may hereafter be enacted for the government of cities and towns, except in so far as

they may conflict with the provisions of this charter, shall apply to the said municipality and the officers thereof."

A general law then in force, passed in 1885, chapter 3605, Laws of Florida, provided as follows:

"That all incorporated cities and towns in the State of Florida, be and they are hereby empowered to levy and collect a special tax annually, for water works and fire protection, upon all property within the corporate limits of any such city or town:

"*Provided*, That it shall require a two-thirds vote of the city council to levy said tax, and that thirty days' notice of the intention to levy said tax shall be given by publication in some newspaper published in said town, once in each week:

"*Provided further*, That said tax shall not exceed five mills on the State valuation of the property within such corporation."

The general law for the organization of municipal corporations in force at the time of the passage of the Tampa charter (McClellan's Digest, p. 248 *et seq.*) provided as follows:

"The city or town council shall have the power * * * to construct drains and sewers, and make to the parties injured thereby such reasonable compensation, and charge upon those benefited such reasonable assessments, as may be agreed upon by the said council and the said party or parties; and in case no such agreement can be made, then the council shall appoint five discreet persons, holders of real estate in said city or town, to ascertain and fix on the one hand a fair and equitable assessment, and on the other, a just compensation, and that the said assessment shall be a lien on the real estate improved and assessed, and that every person who enters his particular drain into the main drain, or common sewer, and receives a benefit thereby from draining his land, shall pay to the city or town his proportional part of making or repairing the same" (sec. 17).

It was further provided (sec. 20) that—

"The city or town council shall have the power to prevent and abate nuisances * * * and to pass all laws and ordinances which may be necessary for the preservation of the public health."

And section 21 provides that—

"The city or town council shall have power to construct wharves, quays and docks * * * to make and sink wells, erect pumps, dig drains; to pass all necessary laws to guard against fire * * * to provide for the lighting of streets of the city or town * * * and to do and perform all such other act or acts as shall seem necessary and best adapted to the improvement and general interest of the city or town."

Cities and towns are further given the power "to borrow money or contract loans for the use of the city or town" (sec. 23); to issue bonds "whenever it may be necessary for the purpose of building or repairing the public works of the city, the widening and extension of the streets or parks, payment of existing indebtedness of the city or any other municipal purposes" (sec. 24); "to raise money by tax and assessment upon all real and personal property, and by license on all professions, business and occupations carried on within the corporation, all sums of money which may be required for the improvement and good government of the city, and for carrying out the power and duties herein granted and imposed" (sec. 29).

After the decision of this court in the case of Freeport Water Company *vs.* Freeport, 180 U. S., 587, the Florida legislature, which met within two weeks after that decision, enacted almost literally the Illinois statute before the court in that case, the Florida enactment, chapter 5070, Acts of 1901, page 240, being as follows:

"That the corporate authorities of any city, town or village now or hereafter incorporated under the general or special law of this State, in which any individual, company

or corporation has been, or may hereafter be, authorized by such city, town or village to supply water to such city, town or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation to such city, town or village and the inhabitants thereof, such charges to be just and reasonable: *Provided*, That this act shall not be so construed as to impair the validity of any valid contract heretofore entered into between any city, town or village and any person, firm or corporation for the supply of water to such city, town or village or its inhabitants. But this act shall not be held to validate any contract heretofore made."

In pursuance of the act of 1901, above quoted, the city of Tampa passed an ordinance undertaking to regulate rates for water supplied to the municipality and its inhabitants, which were less than those the plaintiff in error asserted the right to charge under its contracts with the city, embodied in prior municipal legislation; and to enjoin the enforcement of that ordinance, on the claims above stated, that it impaired the obligation of a contract and deprived the plaintiff in error of its property without due process of law, was the object of the litigation now before the court for review.

No question is before the court as to the reasonableness of the rates fixed by the ordinance sought to be enjoined, as it was not claimed in the litigation in the State court that such rates were in any respect unreasonable, and the only basis for the alleged claim that the ordinance undertook to deprive the plaintiff in error of its property without due process of law rested in the assertion that it prohibited plaintiff in error from charging the rates it claimed a right under its alleged contracts to charge.

The case of plaintiff in error, as presented by its bill of complaint in the State court, with the amendment thereto, is as follows:

On September 29, 1887, the city of Tampa passed an ordinance granting W. A. Jeter and A. E. Boardman, their as-

sociates, successors, and assigns, the exclusive right and privilege to construct, maintain, and operate water works for public and private supply of water within the city for a term of thirty years. The franchise was granted subject to the terms of a contract embodied in the ordinance, which specified the capacity of the reservoir, the standard of pressure to be maintained, the size and location of mains, location of hydrants, etc., and various other provisions in this connection not material to be set forth.

It bound the city to pay annually the sum of four thousand nine hundred and fifty dollars ($4,950), in equal semi-annual payments, on the first days of January and July of each year, and to pay forty-five dollars ($45) per annum for each additional hydrant made necessary by the growth of the city during the continuance of the contract. It further provided for payment by the city, at a rate not exceeding twenty-five cents per cubic foot, for water used in public fountains. It was thereby "agreed that the owners of said water works may charge and collect quarterly, in advance, for water furnished private consumers, prices not to exceed the following maximum rates and rules:

"Dwellings, single spigot on the premises, for domestic use only	$12 00
"Bath-tub in addition	8 00
"Water-closets	8 00
"Wash-basins	4 00"

Succeeding this were various rates for different uses, and there was a general provision that "for all uses not herein specified the prices shall be within the discretion of the water works company.

The contract provided that the grantees therein should have the "exclusive rights to streets," and it forbade "the laying of pipes through the streets by others for the sale of water during the continuance of this contract." It was provided that the contract should continue in force for the

space of thirty years from the time the water works were "completed and ready for duty," with a proviso that after the expiration of ten years the city should have a right to purchase the water works, "together with all the appurtenances thereunto belonging, at the value thereof, such price and value to be agreed upon by the parties to this contract, or their successors, by giving to the parties of the second part notice one year in advance of its intention so to do." There was a provision for arbitration in case an agreement as to price could not be reached by the parties. It was further provided that "should the city not wish to purchase at the expiration of thirty years, then this contract is to be renewed for not less than five years, and then this franchise shall cease and be reopened for competition, and at the option of the city."

The contract further provided that the grantees were "to supply with water, for the payment of city taxes and license, for the first ten years of this contract, the city hall, guard-house, and market-house, with one spigot each, of a half-inch opening, also two drinking fountains, with one-quarter-inch openings, at such places on the mains as designated by the city council."

The contract also contained the following provision:

"And it is further agreed that a sufficient tax shall be levied and collected annually upon all taxable property of the city, subject by law to such tax, to meet the payments under this ordinance as they may respectively mature during the existence of any contract for public fire service, which tax shall be irrepealable from and after the passage of this ordinance; and in case the city shall be authorized to levy a special tax for such purpose, such tax shall be annually levied and collected, and the proceeds thereof shall be kept as a separate fund, and shall be irrevocably and exclusively devoted to the payment of the hydrant rentals under this ordinance, and shall not be otherwise employed, except that in excess of said tax in any one year more than the amount necessary to pay the rentals for such year may be used for any purpose or purposes that the city council shall direct.

"And it is further agreed that the city shall pass such ordinances as will protect the property of the party of the second part, and enforce such penalties and fines upon any one injuring said property as shall, when divided between the parties to this contract, reimburse the parties of the second part for repairs made necessary by such injury, provided that the damages do not exceed the fine limited by the charter."

The ordinance in which the foregoing contract was incorporated provided that "the owners of said water works may charge and collect quarterly for water furnished private consumers, prices not exceeding the price named" therein, and that the city should "levy and collect no municipal tax against the water works upon its stock or earnings or upon material entering into their construction or operation during a period of ten years from the passage of this ordinance," and that "for the purpose of fully maintaining the water works provided for herein, there shall (be) annually levied and collected on all real estate and personal property within the corporate limits of the city of Tampa a tax of five mills, which shall be applied to the payment of the obligation named herein, and for no other purpose," and that for the purpose of carrying out the provisions of this contract the city "does hereby guarantee the payment of the interest to accrue upon the bonds which may be issued by the said Jeter and Boardman, constituting the Tampa Water Works Company, at the rate of six per cent. per annum, which sum, not to amount in the aggregate to more than four thousand nine hundred and fifty dollars, to an amount of said bonds, not to exceed the sum of eighty-two thousand and five hundred dollars, said interest payable semi-annually for a period of thirty years, which said interest coupons shall be made payable at the treasurer's office of the said city of Tampa, and shall be receivable for taxes and all other debts and obligations due said city; and said coupons, when paid by the treasurer of Tampa, as aforesaid, shall be a receipt and

acquittance to said city in discharge of said sum of four thousand, nine hundred and fifty dollars, agreed, as aforesaid, to be paid annually to said Tampa Water Works Company, for the rental of said one hundred and ten hydrants to the extent and amount of said coupons so paid."

This ordinance required the water works to be completed and in operation by the 1st day of January, A. D. 1889.

On June 6, 1889, another ordinance was passed, purporting to amend the foregoing one. It ordered an extension of the mains, and that twenty-seven additional hydrants should be put in, for which the city should pay the additional sum of twelve hundred and fifteen dollars ($1,215) per annum, and it also amended the provision of the previous ordinance guaranteeing the payment of interest on the bonds to be issued by the water works company so as to read as follows:

"That the city of Tampa hereby approves, ratifies and confirms the foregoing contract made and entered into with said Jeter and Boardman and associates, constituting the Tampa Water Works Company, by the mayor and president of, and the city council of, said city of Tampa, Fla., with these amendments, and for the purpose of carrying out the provisions of the same does hereby guarantee the payment of the interest to accrue upon the bonds which may be issued by said Tampa Water Works Company, on the first day of January, 1890, at the rate of six per cent. per annum, such sum not to amount in the aggregate to more than six thousand, one hundred and sixty-five dollars per annum; and the said bonds not to exceed the sum of one hundred and two thousand dollars, said interest payable semi-annually for the period of the unexpired term of franchise granted Jeter and Boardman, September 20th, 1887, which said interest coupons shall be made payable, less the exchange, at the office of the Farmers' Loan and Trust Company, in the city of New York, or at the office of the city treasurer of the city of Tampa, and shall be receivable for taxes and all other debts and obligations due said city. And said coupons, when paid by the treasurer of Tampa, or said trust company, shall be a receipt and acquittance to said city in dis-

charge of said sum of six thousand, one hundred and sixty-five dollars, as aforesaid, to be paid annually to said Tampa Water Works Company, for the rental of said one hundred and thirty-seven hydrants, to the extent and amount of said coupons paid."

On February 6, 1890, another amendatory ordinance was passed by the city, reciting in a preamble thereto the passage of the foregoing ordinances; that "because of questions that have been raised as to the true intent and meaning of the terms in said ordinance No. 7 (the original one), whereby the city reserves the right to purchase the property therein mentioned, the said water company has encountered difficulty and been delayed in raising the money needed to complete the said works and get the same into running order, so that it has become necessary to change the time of the issue of the bonds proposed as aforesaid," and that "it is to the interest of the city of Tampa that the said works should be completed at as early a date as possible, and it is also desirable that the right reserved to said city should be free from any doubt;" therefore it was ordained "that the true intent and meaning of said ordinance No. 7 is to reserve to the city of Tampa the right to purchase, at any of the periods therein designated, all of the property of every kind belonging to the Tampa water works, including the franchise and privileges granted by the said ordinance, and now enjoyed by the said company; and in case the said city and the said company fail to agree upon the price thereof, that the value of said property, including the franchises and privileges aforesaid, shall be determined by arbitrators in the manner provided in the said ordinance." The provision as to the bonds, interest on which was guaranteed by the city, was also amended so that the bonds for $102,000 might be dated March 1, 1890, "and the interest made payable at the Safe Deposit and Trust Company of Baltimore, or at such other place as may be designated by the water company," and it was provided that the first payment of rental

should be on July 1, 1890. This ordinance contained a further provision that in case the city elected to exercise its right of purchase any unmatured bonds then outstanding should be deducted from the cash price to be paid for the property, and the amount so deducted should be payable by the city on maturity of the bonds.

Jeter and Boardman, with their associates, organized a corporation "under the general incorporation laws of the State of Florida as they existed in the year 1887 * * * solely for the purpose of engaging in the business of furnishing a public and private supply of water to the city and its inhabitants," which was called The Tampa Water Works Company (plaintiff in error herein), "and in the year 1888 put into successful operation its water works, whereby it acquired all the rights, powers and privileges conferred upon corporations of a like nature at that time."

On January 24, 1899, the City of Tampa filed a bill against the Tampa Water Works Company in the circuit court of Hillsborough county, setting forth the various ordinances hereinbefore referred to, and alleging that the company had failed to furnish the city sufficient water pressure or to give a first-class fire protection, as it had contracted to do; that the city had no right to contract with the company for a water supply for a period of thirty years or to bind the city to guarantee the interest on the company's bonds; that the city had no right to fix the rates to be charged consumers for a period of thirty years; that the alleged contract with the company was null and void, and under ordinance No. 199 of the city, made a part of said bill, the previous ordinances before referred to were repealed.

The bill prayed that the contract and ordinances under which the company claimed be declared null and void; that so much thereof as undertook to give defendant an exclusive right for thirty years at the rates specified be declared null and void and the city be released from the conditions thereof; that so much as provided for the guaranty by the

city of interest on defendant's bonds be declared null and void; that the entire contract be declared null and void, and for other relief.

The company answered this bill, denying specifically any breaches of contract on its part; denying that the contract was null and void on account of any of the matters alleged in the bill; denying the right of the city to pass ordinance No. 199, repealing the aforesaid ordinances; alleging that said ordinance No. 199 impaired the obligation of a contract, was in violation of article 1 of section 10 of the Constitution of the United States and of the fourteenth amendment thereto, and of the constitution and laws of Florida. The said answer further reserved, as ground of demurrer to the bill, that it was wanting in equity.

On October 4, 1899, the city council passed a resolution, reciting in its preamble that "Whereas, there is in existence and force a valid contract between the City of Tampa and the Tampa Water Works Company, which said contract is hereby recognized by both the City of Tampa and the Tampa Water Works Company as binding upon the parties; and whereas, there is now pending in the circuit court of Hillsborough county, State of Florida, on the chancery side thereof, certain litigation between the City of Tampa, on the one part, and the Tampa Water Works, on the other, over the construction of said contract heretofore entered into between the said City of Tampa and the said Tampa Water Works Company; and whereas, it is to the mutual interest of both parties that the said litigation should be terminated;" and further reciting that the parties had come to an agreement in the terms therein incorporated to the effect that the Tampa Water Works Company from and after January 1, 1900, should make certain specified reductions in water rates, and containing various other provisions not material to be set forth, except one on the part of the city to dismiss all pending suits against the company, and one that the city would not during the life of the contract enter into compe-

tition with the company in supplying the city or its inhabitants with water.

Pursuant to this agreement, the city solicitor, on October 9, 1899, filed a præcipe for the dismissal of its bill, and on the same day the clerk made an order in the following words:

"Præcipe for dismissal, and suit hereby dismissed."

On December 20, 1901, the city council passed the ordinance, enforcement of which was sought to be enjoined, entitled "An ordinance to fix the rates and charges for the supply of water furnished by any individual, company or corporation to the City of Tampa and the inhabitants thereof." This ordinance made it unlawful to charge after the first day of January, A. D. 1902, any rates in excess of certain maximum rates for various specified uses therein set forth, which rates were lower than those specified in the former ordinance and the agreement modifying the same.

All of the facts hereinbefore stated were set forth in the bill of complaint of the plaintiff in error as finally amended, and the question for determination by this court is whether or not, upon the facts alleged, which were admitted by the demurrer, in view of the various provisions of law hereinbefore set forth, the State court erred in holding that there was no equity in the bill of complaint, and that the plaintiff in error was entitled to no relief.

ARGUMENT.

If it be, as we believe and shall hereafter contend, that no obligation or duty, assumed by contract or imposed by law, rested upon the plaintiff in error to furnish water to the municipality of Tampa and its inhabitants, it is obvious that it had no standing to claim relief from the operation of the ordinance sought to be enjoined, as such ordinance in that event could neither impair the obligation of a contract nor deprive it of its property without due process of law. We shall assume, however, under this branch of the argument, as did the State supreme court while expressing doubt in respect to the validity of the contract in various aspects, that there was a contractual obligation between the plaintiff in error and the city.

The basis of the decision of the State court is expressed in the opinion rendered in the following language:

"The charter of the present City of Tampa, as well as the charter of the water company, was granted, and the contract in question was entered into, after the constitution went into effect, and the powers granted to the city and the water company, to contract as well as the contract entered into, must be construed in connection with, and limited by the constitutional provision referred to," viz., section 30, of article 16, by which power is reserved to the legislature "to pass laws * * * to prevent unjust discrimination and excessive charges by persons and corporations * * * performing * * * services of a public nature."

Continuing, the court says:

"The power mentioned in this section is full power; a continuing, ever-present power. Being irrevocably vested by this section, the legislature cannot divest itself of it. Neither can it bind itself by contract, nor authorize a municipality—one of its creatures—to bind it by contract, so as to preclude the exercise of this power whenever, in its judgment, the public exigencies demand its exercise. Full power

cannot exist, if by contract that power can be curtailed or impaired * * * With this section in force, the power to surrender by contract the right to regulate rates is taken away; for the authority to surrender cannot coexist with the ever-present continuing power to regulate, which is declared by this section to exist in the legislature * * * The section not only becomes a part of every such contract, as much so as if written therein, but by implication it denies the authority of the legislature to bind itself, either by a contract of its own making, or one made by a municipality under its authorization, not to exercise the power thereby recognized whenever in its wisdom it should think necessary so to do. The effect of this section is to reserve to the legislature full power at all times, notwithstanding any supposed contract not to exercise it, to require water companies and others mentioned in the section to comply with their common-law obligation to supply their customers at reasonable rates; and, such being its construction, we do not see that the contract between the water company and the city is impaired by the ordinance of December 20, 1901, nor that the water company is thereby deprived of its property, without due process of law."

Tampa Water Works Co. *vs.* Tampa, 34 So. Rep., 631; text, 639.

Section 30 of article 16 of the Florida constitution is a self-executing limitation upon legislative power.

Davis *vs.* Burke, 179 U. S., 399.

And under such provisions it has often been held by this court, in similar cases, that there can be no complaint that the exercise of such reserved power impairs the obligation of a contract, or deprives a party of property without due process of law, subject to the suggested qualification that there might be such an abuse of the power, under the guise of its exercise, as to call for interference.

Stanislaus Co. *vs.* San Joaquin, etc., Co., 192 U. S., 201.

Knoxville Water Co. *vs.* Knoxville, 189 U. S., 434.

N. C. R. Co. *vs.* Maryland, 187 U. S., 258.

Citizens' Saving Bank *vs.* Owensboro, 173 U. S., 636.
L. & N. R. Co. *vs.* Kentucky, 183 U. S., 503.
Covington *vs.* Kentucky, 173 U. S., 231.
Sioux City, etc., Co. *vs.* Sioux City, 138 U. S., 98.
U. S. *vs.* U. Pacific R. Co., 160 U. S., 1.
Louisville Water Co. *vs.* Clark, 143 U. S., 1.
Gibbs *vs.* Gas Co., 130 U. S., 396.
Spring Valley Water Works *vs.* Schottler, 110 U. S., 347.
Greenwood *vs.* Union Freight R. Co., 105 U. S., 13.
Pennsylvania College cases, 13 Wall., 190.

These cases establish beyond question the correctness of the decision of the State court, and the reasoning of the State court is exactly that of this court in Stanislaus Co. *vs.* San Joaquin Co., *supra*, decided after this case was decided in the State court.

Much stress seems to be laid in the briefs of counsel for appellant upon the proposition that section 30 of article 16 of the State constitution *granted* no new power to the legislature and was not self-executing. The contention so made involves a radical misunderstanding of the nature of a State constitution. It is both fundamental and elementary that such a constitution is not a *grant* of power, but a limitation, and in the nature of things every such limitation, *as a limitation*, is self-executing or inherently effective. The provisions of a State constitution are designed in and of themselves to be restrictions in so far as they either expressly or by implication prohibit legislation in derogation thereof. Legislation may be necessary, as it often is, to carry into effect the mandate of a constitutional provision, but none the less is the constitutional provision a presently operative limitation upon legislative power.

Cooley's Const. Limitations (7th ed.), p. 120, note 5.
Id., p. 127 *et seq.*

Counsel for appellant are undoubtedly correct in their assertion that the clause above referred to was not a grant of power to the legislature, and we can conceive of no force it could have except as a limitation, operating upon all transactions as to which it could by its terms be applicable. It cannot be presumed that such a provision was inserted in the constitution for no purpose, and its undoubted object was to make inalienable, by legislation or otherwise, the power thereby reserved. To this extent it required no legislation to make it effective. Legislative action would be necessary, as occasion arose, to execute the mandate, and to that extent the provision was not self-executing; but that affords no justification for appellant's position, which seems to be, that until some particular law should be passed, to carry out the object of the clause of the constitution, parties could make a contract upon which neither the constitutional provision nor the law passed in pursuance thereof would operate. Otherwise expressed, that could be done by a subordinate governmental agency of limited powers which the legislature itself could not authorize by express legislation. It is sufficient to say that the tail does not wag the dog.

Moreover, section 8 of article 8 of the State constitution expressly reserved the power to alter or amend the powers and duties of a municipality at any time, and the Tampa charter itself, in the provisions quoted in the statement of the case, provided in two different sections that subsequently enacted laws in relation to municipal powers and duties should apply to the City of Tampa, so that there can be no possible claim that the act of 1901, in pursuance of which the ordinance sought to be enjoined was adopted, did not apply with full force to the City of Tampa.

Freeport Water Co. *vs.* Freeport, 180 U. S., 587.

Owensboro *vs.* Owensboro Water Works Co., 191 U. S., 358.

It is a significant fact that nowhere, either in the charter of Tampa or in the general law to be construed in connection with it, is there authority given to delegate municipal powers or duties, to be performed by others under contract, and the implication of every provision is to exclude the idea of such delegation—a fact which will be more particularly considered hereafter. But, assuming that such power of delegation existed by necessary implication, which the plaintiff in error is compelled to do, the plaintiff in error, in order to sustain its contention, has further to maintain the proposition that such necessary implication deduced from authority to make ordinances "not inconsistent with the constitution or laws of the State" operated to prohibit the exercise of power expressly reserved by the charter itself as well as by the State constitution. In other words, the plaintiff in error has to deduce for the City of Tampa by necessary implication an authority paramount to and overriding the express letter of the law and constitution, notwithstanding that the grant of authority is expressly made subject to both. This is a novel illustration of the maxim, "Necessity knows no law." A creature can neither transcend the law of its being nor can an agent cast aside the limitations of its principal's authority, and it is in the highest degree absurd to contend to the contrary.

Gas Co. *vs.* Middletown, 59 N. Y., 228.

(*b.*) Besides, it may well be doubted whether settled rules would admit such a construction of the ordinance as to furnish a predicate for the contention of plaintiff in error in any event. The language could fairly be construed so as not to import a contract right to charge the specified rates during the life of the contract, and the court would struggle hard to so construe it rather than admit a contract right to charge confessedly unreasonable rates.

Rogers Park Water Co. *vs.* Fergus, 180 U. S., 624.

But, if the city did have implied power to agree upon rates during the term, it is certain that such implied power only extended to agreeing upon reasonable rates.

Hall *vs.* Cedar Rapids, 115 Iowa, 199.
Flynn *vs.* Water Co., 74 Minn., 180.
1 Dillon on Mun. Corp'ns (4th ed.), secs. 319, 320, 328.
IV Thompson on Corp'ns, sec. 5647.
Johnson *vs.* P. & P. R. Co., 16 Fla., 623.

And the bill of complaint admitted that the rates as fixed for the term were unreasonable, for it expressly alleged that the plaintiff in error "decided that it could reasonably make certain reductions in the rates which it was authorized under its original contract to charge both the City of Tampa and the inhabitants thereof" (Transcript, p. 3). This is a conclusive admission that the rates as fixed for the term were unreasonable, and is further strengthened by the admission, arising from failure to deny that the rates as fixed by the ordinance sought to be enjoined are reasonable. So that, in its last analysis, the plaintiff in error seeks to have the court uphold as valid and enforceable an admittedly unreasonable exercise of municipal power under an implied authority, if any, for a reasonable exercise.

II.

In order to affirm the decision of the State court, it is not necessary to go further, but the broadest possible ground upon which a decision could be rested is that the plaintiff in error stood in no contractual relation with the city at all, and we believe this can be demonstrated beyond question

(*a.*) Accepting the theory of the plaintiff in error, as set forth in its bill, the entire contract was invalid. The bill alleges "that the inducement to invest the money of your

orator in said plant was that the said rates so fixed in said contract should be charged during the entire time thereof," and that the rates as agreed to for the entire term of thirty years "were the sole consideration moving your orator to the undertaking and carrying out of said contract" (Transcript, pp. 2–3). If rates to be charged were fixed incidentally by a section of an ordinance granting a franchise, independently of the section fixing rates, it might be that such section would constitute a separable part of the contract; but where such rates are the subject of mutual agreement, as the sole inducement to making a contract, it cannot be doubted that if the part of the agreement fixing rates is invalid the contract must fall as an entirety. To hold otherwise would make a new contract, as to the terms of which the parties never assented.

See Detroit *vs.* Detroit R. Co., 184 U. S., text 384.
Connolly *vs.* Sewer Pipe Co., 184 U. S., text 565.
Gaslight Co. *vs.* Albany, 156 Ind., 406.
Wellston *vs.* Morgan, 59 Ohio St., 147.
Manhattan Trust Co. *vs.* Dayton, 59 Fed. Rep., 327.
Kirkwood *vs.* Meremac Co., 68 S. W., 761.
Davis *vs.* Town of Harrison, 46 N. J. L., 79.
City of Somerset *vs.* Smith, 49 S. W., 456.
Board of Finance *vs.* Jersey City, 55 N. J. L., 230.
1 Thompson on Corp'ns, sec. 658.

The application of this principle, in view of the allegations of the bill, cannot be doubted.

Warren *vs.* Mayor, etc., 2 Gray, text 99.

(*b.*) Under the law as it existed when this contract was attempted to be made, there was no authority to contract with a private corporation for water supply.

The first general law authorizing contracts to be made by municipalities in Florida was passed in 1893, chapter 4166, Laws of Florida, and is as follows:

"SECTION 1. That the council of any city or town of this State is hereby authorized and empowered to enter into an agreement or agreements with gas, electric light, or water works companies, for lighting the streets, or constructing and operating water works in such city or town: *Provided*, That such agreement or agreements shall be ratified by a majority vote of the freeholders of such city or town, and voting at an election to be held for the purpose of ratifying said agreements: *Provided further*, That a copy of the agreement or agreements, together with a notice of such election, shall be published in a newspaper in such city or town for four consecutive weeks prior to said election.

"SECTION 2. That under the provisions of this act no city or town in this State shall, through the council of said city or town, contract or agree to pay in any one year, for any one of the purposes enumerated in section 1 of this act, a sum of money exceeding four mills on the assessed valuation of the property in such city or town."

In 1887 the City of Tampa had power under its charter by ordinance "to provide for the establishment of water works," and under the general act of 1885 it had power "to levy and collect a special tax annually for water works and fire protection upon all property within the corporate limits," by a two-thirds vote of the council, upon thirty days' published notice, such tax not to exceed five mills on the State valuation of the property. It was subject to the same powers and duties granted and imposed by general law, which in respect to water supply authorized the municipality "to make and sink wells, erect pumps, dig drains." Construing the laws together, it will thus be seen that the City of Tampa had power, when the attempted contract was sought to be made, "to provide for the establishment of water works" in the manner particularly pointed out in the general law, viz., "to make and sink wells, erect pumps, dig drains."

Mernaugh *vs.* Orlando, 41 Florida, 433.

While no express authority to contract is granted, either under the Tampa charter or the general law, there can be no

doubt that, as necessarily incidental to the granted powers, the city could make a contract for the digging of wells, erecting of pumps, and digging of drains, but it is a very different proposition to say that it could by contract barter away or delegate the entire subject-matter. Questions of this character are simply questions of the construction of the particular statutory provisions involved, in view of the rules that if there is any reasonable doubt of the existence of the power it will be denied, and that a power sought to be deduced by implication must be absolutely necessary to the exercise of a granted power; if merely convenient, it will not exist.

Detroit, etc., R. Co. *vs.* Detroit Ry., 171 U. S., 48.
F. C. & P. R. *vs.* Ocala, etc., R. Co., 39 Florida, 306.
Galloway *vs.* Tavares, 37 Florida, 58.
Jacksonville E. L. Co. *vs.* Jacksonville, 36 Fla., 229.
Ottawa *vs.* Carey, 108 U. S., 110.
Minturn *vs.* Larue, 23 How., 435.

We grant that the City of Tampa had authority to make contracts necessarily incidental to the carrying out of its charter powers and duties, but we affirm that nowhere in the charter or general law, until the passage of the act of 1893, can authority be found to enter into continuing contracts for the performance of municipal powers and duties, and that such authority was not necessarily incidental to the execution of the expressly granted powers.

The city was authorized to dig wells, erect pumps, and dig drains, and to levy a special tax for that purpose, but it cannot be reasonably supposed that it was to raise this special tax for the benefit of a private corporation. On the contrary, the tax was for the purpose of enabling the city to exercise its powers.

See Passaic Water Co. *vs.* Patterson, 65 N. J. L., 472.

And an examination of the related clauses, particularly that in regard to drains (McClellan's Dig., p. 248, section 17),

shows clearly that it was intended the city itself should exercise the authority granted.

Moreover, when the legislature of 1893 did grant the power to make contracts, it is worthy of attention that the act purports to be, and is, an enabling act, pure and simple, hedged with the restrictions that such contracts must be ratified by a vote of the people, after notice and publication of a copy of the proposed contract.

(c.) The alleged contract is void for another reason—that it undertook to grant an exclusive franchise for a term of thirty or thirty-five years, as the case might be.

The common and statute law of England, as it existed down to July 4, 1776, except so far as it is inconsistent with the Constitution and laws of the United States and of the State, is in full force in Florida.

Revised Statutes, sec. 59.
State *vs.* Call, 39 Fla., 165.

This includes the English statute, 21 James I, chapter 3, against monopolies, which makes them void.

IV Blackstone, 159.

And if such purported grants are void, the whole contract must fall to the ground.

Edwards Co. *vs.* Jennings, 89 Tex., 618.
Kirkwood *vs.* Meremac Co., 94 Mo. App., 637.
Thrift *vs.* Elizabeth City, 122 N. C., 31.
See also Walla Walla *vs.* Water Co., 172 U. S., text 14–15.

(*d.*) Many other features taint the asserted contract with illegality to such an extent that if they were eliminated it would be something different from what the parties intended. As examples, we cite the following:

(1.) The provision by which the city guaranteed the payment of interest on the bonds of the water company was in

direct violation of section 10 of article 9 of the State constitution, which reads as follows:

"The credit of the State shall not be pledged or loaned to any individual, company, corporation or association; nor shall the State become a joint owner or stockholder in any company, association or corporation. The legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual."

If it be said that the guaranty could be satisfied on account of water rents due by the city, and that it was simply a means of discharging such rents, the answer is that if the provision were valid, the city would be liable to the bondholders on its guaranty, whether the company supplied water or not.

(2.) Section 7, by which the city undertook "to levy and collect no municipal tax against the water works upon its stock or earnings, or upon material entering into their construction or operation during a period of ten years," was in clear violation of the law of Florida.

Tampa *vs.* Kaunitz, 39 Fla., 683.
Little Falls, etc., Co. *vs.* Little Falls, 74 Minn., 197.
Dayton *vs.* Water Co., 68 S. W., 142.
Austin *vs.* Gas Co., 69 Tex., 187.

(3.) The tax levy provided by section 11 of the ordinance of a special tax of five mills to meet the obligations incurred thereunder was void for the reason that such levy was made without publication of thirty days' notice, as provided by the general act of 1883, already quoted, chapter 3605, Laws of Florida.

See Harrodsburg *vs.* Water Co., 64 S. W., 658.

(4.) Authority is unnecessary to the point that the agreement to divide fines with the water company was contrary to public policy and void.

(5.) The agreement that if the city elected to exercise its option to purchase the plant it should compensate the company for its franchise was void, and indicated to what extent the company sought to obtain a reckless surrender of the city's rights and duties.

(6.) If the contention should be made that the agreement of October 4, 1899, imparted validity to the contract, that agreement was void for failure to comply with the act of 1893, requiring such agreements to be ratified by a majority of the freeholders (chapter 4166, Laws of Florida).

III.

If reliance should be placed upon the agreement of October 4, 1899, followed by the dismissal of the city's pending suit against the water company, it would avail the plaintiff in error nothing, for the reason that the agreement, besides being invalid for failure to submit the same for ratification by the freeholders, was equally invalid with the original ordinance, and the dismissal of the suit on the præcipe of counsel for complainant by the clerk of the court adjudicated nothing. Such a dismissal by the clerk has since been held by the Florida court to be a nullity.

Long *vs.* Anderson, 37 So. Rep., 216.

But it would certainly be an anomaly if a municipal corporation could impart validity to an invalid contract by agreeing to dismiss a pending suit involving the question of invalidity, or even by a consent decree adverse to it. That cannot be done indirectly which cannot be done directly, and the agreement or consent in such a case would be as

much *ultra vires* as the original agreement, and no decree thus rendered could operate as an estoppel.

Kelly *vs.* Milan, 21 Fed., 842; affirmed 127 U. S., 139.
Brownsville *vs.* Loague, 129 U. S., 493.
Lawrence Manufacturing Co. *vs.* Cotton Mills, 138 U. S., 552.
Northern C. R. Co. *vs.* Maryland, 187 U. S., 258.
Union Bank *vs.* Commissioners, 34 L. R. A., 487.
Comm'rs *vs.* Union Bank, 96 Fed., 293.
Kane *vs.* School Dist., 82 Iowa, 5.

IV.

Considerable space is consumed in the brief of counsel for appellants in asserting that "the original contract between the City of Tampa and the Tampa Water Works Company has been ratified by the legislature of Florida." Of this contention it may be said, as was said by the State supreme court, that the legislature itself could neither contract, nor authorize a contract, in derogation of the rights reserved by the constitution. But an equally effective reply is that the minor premise of appellant's argument is false. Such minor premise is that Tampa is a city included within the provisions of sections 725 and 726 of the Revised Statutes of Florida (whose acts and doings are validated under the provision of section 727). The provisions of the former sections, which are set forth in appellant's brief at pages 7–8, disclose that section 725 only applies to "incorporated cities and towns which, *prior to February 4, A. D. 1869*, reorganized under the provisions of" an act passed in 1868, and "have since been exercising the privileges and powers granted by said act." Section 726, which is the provision of an act passed in 1887, only applies to "cities and towns which now are and for ten years last past have been exercising municipal government," to which class Tampa does not belong, for the act incorporating it was not passed until June 2, 1887 (ap-

pellant's brief, p. 4), and even if the insertion of the clause in the revision lent it new force (a doubtful proposition), the Revised Statutes became operative in June, 1892 (appellant's brief, p. 35), less than ten years after the incorporation of the city of Tampa.

The other branch of the argument under this head, that the validation by the legislature of tax assessments in the city of Tampa for the years from 1888 to 1898, inclusive which included taxes to pay water rents, validated the contract, does not merit serious consideration; nor do the authorities cited to the effect that the State, which alone could object to defective corporate organization, may by legislation recognize the validity of a corporation bear on the question

See State *vs.* Lincoln Trust Co., 144 Mo., 562.
S. F. & W. R. Co. *vs.* Jordan, 113 Ga., 687.
Graves *vs.* Seattle, 8 Wash., 248.
11 Lewis' Sutherland on Stat. Construc., sec. 515.

V.

If the plaintiff in error should undertake to assert any rights under the incorporation statute of 1868, it could not do so successfully as to the original contract, for that was made with individuals and not with a corporation. Nor could it do so for the further reason that this general act could not control in respect to rights sought to be acquired from the city, which by subsequent special legislation was invested with full and exclusive authority in respect to the subject-matter. But, to place the matter upon the broadest ground, the incorporation act of 1868 was unconstitutional. It provided as follows (McClellan's Dig., p. 228, sec. 4):

"Previous to commencing any business, except its own organization, it shall be the duty of the officers of every corporation to file with the secretary of state a copy of the articles of incorporation, and a copy of such articles shall also be filed at the same time in the office or offices of the county clerk

or clerks in which county or counties said corporation shall do business, or in which its works and operations exist, and the corporate existence of every corporation shall date from the time of filing said copies of such articles."

It further provided (sec. 30, p. 234), that:—

"Any corporation organized and put into successful operation under this chapter shall have exclusive privileges for the purposes of its creation for the term of twenty years from the date the corporation commenced to carry out in good faith the terms of its articles of incorporation: *Provided, however,* That this investment shall not so operate as to divest any future legislature of those powers of government which are inherent and essential attributes of sovereignty, to wit: the power to create revenue for public purposes, to provide for the common defense, to provide safe and convenient ways for the public necessity and convenience, and to take private property for public use, and the like."

The latter section, even if operative, was, of course, restrained, so far as the plaintiff in error is concerned, by the constitution of 1885, which became operative before the plaintiff in error came into existence; but it is clear that the act violated the State constitution of 1868, in force at the time it was enacted. That constitution provided, section 13 of article 5, as follows:

"All grants and commissions shall be in the name and under the authority of the State of Florida, sealed by the great seal of the State, signed by the governor and countersigned by the secretary of state."

The same provision was preserved in the constitution of 1885, now in force.

It is, moreover, a most significant fact that in the first State constitution, which was adopted on January 11, 1839, with a view to the admission of Florida as a State, and which became the first State constitution under the act of Congress

approved March 3, 1845, admitting Florida and Iowa as States, the clause read as follows:

"All *commissions* shall be in the name, and by the authority of the State of Florida, be sealed with the State seal, and signed by the governor, and attested by the secretary of state."

Section 13, article III, constitution of 1838.

It is thus made clear that the word "grants" was advisedly added in the constitutions of 1868 and 1885, and if a charter of incorporation is a grant, it is obvious, therefore that it could only, in accordance with the constitution, be in the name and under the authority of the State, sealed by the great seal, signed by the governor, and countersigned by the secretary of state, and that such a charter is a grant cannot be questioned. As was said by Justice Story in the Dartmouth College case, such a charter "is, in the strictest sense of the terms, a grant."

4 Wheaton, text, 683, 637, 656, 658, 682, *et seq.*

Innumerable authorities to the same effect might be cited, but it would be a mere waste of time, as every-day expressions, juridical and non-juridical, recognize such franchises to be grants.

Rex *vs.* Passmore, 3 Term Rep., 246.

1 Blackstone, 272; 2 *id.*, 346, 347.

IV Thompson on Corp'ns, secs. 5, 335, 5345, 5348, 5353.

VII *id.*, secs. 8161, 8294.

Ry. Co. *vs.* People, 73 Ill., 541.

Atlantic, etc., R. Co. *vs.* Allen, 15 Fla., text, 664.

State *vs.* F. C. R. Co., 15 Fla., 690.

Capital City, &c., Co. *vs.* Tallahassee, 42 Fla., text, 497–498.

It is illustrated by the fact that *quo warranto* is the remedy for usurpation.

V Thompson on Corp'ns, sec. 6767 *et seq.*
State *vs.* Gleason, 12 Fla., 190.
Enterprise *vs.* State, 29 Fla., 128.

And the constitutional provision quoted above is but an embodiment of what the King's "grants or letters patent" contained, in virtue of which corporations were created at common law, modified by the difference in the form of government.

11 Blackstone, 346, 347, *supra.*

No one will deny that the State constitution is a limitation upon legislative power, and it follows, therefore, that any legislation in violation of this constitutional provision cannot be sustained. In passing the act of 1874, providing for the formation of railroad corporations, as well as in the law for the creation of corporations contained in the Revised Statutes, the constitutional provision was strictly followed, but it was violated in the act of 1868, chapter 1639, Laws of Florida, under which the rights of complainant are asserted. The only prerequisite to becoming a corporation prescribed by that act was that previous to commencing any business a copy of the articles of incorporation should be filed with the secretary of state, and a copy in the office or offices of the county clerks in the counties where the corporation should do business, or in which its works or operations were carried on, and the statute provided that "the corporate existence of every corporation shall date from the time of filing such copies of such articles."

The legislature thus provided that the grant of corporate powers should be otherwise than in the compliance with the constitutional provision, viz., by the voluntary association of the parties, instead of by letters patent, in the name and under the authority of the State, sealed by the great seal,

signed by the governor, and countersigned by the secretary of state, and the act was thereby necessarily rendered unconstitutional.

State *ex rel.* Murphy *vs.* Barnes, 24 Fla., 29.
State *vs.* Jacksonville Terminal Co., 41 Fla., text, 403.
State *ex rel.* Clyatt *vs.* Hocker, 39 Fla., 477.

It follows, therefore, that the allegations of complainant's bill showed that it not only was not, but it could not have been, possessed of any corporate authority granted by the State, and its corporate authority could not have been admitted by the demurrer to the bill.

Dillon *vs.* Barnard, 21 Wall., 430.

In reply to the contention of counsel for appellants in their supplemental brief, that the legislature did not regard the constitutional provision under discussion as applicable to grants of corporate franchises, we would say that it did, as disclosed by the present law for organizing corporations, which has been in force since 1892 (Revised Statutes, secs. 2124–2126), and also in the law passed in 1874 for the organization of railroad corporations (McClellan's Digest, pp. 274–275), which remained the general law on the subject until the adoption of the Revised Statutes. That the question was never presented to the State supreme court prior to this case is due, doubtless, to the fact that under ordinary circumstances the State alone can question corporate existence, and we can find no case in which *rights* were asserted under act of 1868, so as to make the question now presented a live issue, except Capital City, etc., Co. *vs.* Tallahassee, 42 Fla., 462, which was afterwards before this court under the same title.

186 U. S., 401.

Moreover, section 30, page 234, of McClellan's Digest, under which the complainant especially claims, is clearly

unconstitutional on other grounds. It undertakes to give "exclusive privileges for the purposes of its creation for the term of twenty years from the date the corporation commenced to carry out in good faith the terms of its articles of incorporation" to "any corporation organized and put into successful operation under this chapter;" and it authorizes any corporation to be formed "for the transaction of any lawful business of a public or private character, including all works of internal improvement."

The constitutionality of an act is to be determined not by what has been done under it in a particular case, but by what may be done under its authority.

Stuart *vs.* Palmer, 74 N. Y., 183.
Gilmon *vs.* Tucker, 128 N. Y., 190.
Colon *vs.* Lisk, 153 N. Y., 188.
Minneapolis Brewing Co. *vs.* McGillivray, 104 Fed., 258.

Under this act parties might voluntarily associate themselves together for the purpose of operating wholesale and retail stores in the various cities and towns throughout the State, or generally throughout the State, and thus acquire an exclusive privilege of operating wholesale and retail stores throughout the State, thereby not only preventing individual enterprise in the future in any part of the State, but also taking away the right of every existing storekeeper to continue in business. In the same way the same associates might secure exclusively to themselves, by other articles of incorporation, every line of industry and debar every one from engaging therein. That legislation of this character is unconstitutional is too plain for argument. One of the fundamental rights guaranteed by the Constitution is that of a citizen to pursue any lawful business in any manner not inconsistent with the equal rights of others, and this is inalienable by legislation, subject to the exception

that under the police power certain legislative regulations can be prescribed.

Butchers, etc., Co. *vs.* Crescent City, etc., Co., 111 U. S., 746.

Allgeyer *vs.* State, 165 U. S., 578.

People *vs.* Warden of City Prison, 157 N. Y., 126.

In re Jacobs, 98 N. Y., 107.

State *vs.* Scougal, 15 L. R. A., 477.

It is thus conclusively shown that the complainant has no contract rights, either with the municipality or with the State, which are subject to impairment. In fact, its position is not other than that of a mere licensee whose right to use the public streets of the city in its business can be terminated by the city at any time. It would have no right to complain if its use of the streets for the purpose of its business were absolutely forbidden, and it has no right to complain because an ordinance is passed by the city undertaking to regulate water rates. Its remedy is to stop furnishing water.

Respectfully submitted,

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